HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

VICTORIAN BUILDING AUTHORITY APPELLANT

AND

NICKOLAOS ANDRIOTIS RESPONDENT

Victorian Building Authority v Andriotis
[2019] HCA 22
7 August 2019
M134/2018

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

K L Walker QC, Solicitor-General for the State of Victoria, and C M Harris QC with S Gory for the appellant (instructed by Victorian Government Solicitor)

K P Hanscombe QC with T J D Chalke for the respondent (instructed by Boris Pogoriller)

CATCHWORDS

Victorian Building Authority v Andriotis

Statutes – Construction – Statutory powers – Mutual recognition – Where s 17(1) of *Mutual Recognition Act 1992* (Cth) provides that person registered in one State for occupation entitled to be registered in equivalent occupation in second State where person lodges written notice with local registration authority of second State – Where s 20(1) of *Mutual Recognition Act* provides that registration in first State sufficient ground of entitlement to registration in second State – Where s 20(2) of *Mutual Recognition Act* provides that local registration authority of second State "may" grant registration on that ground – Where s 17(2) of *Mutual Recognition Act* provides that mutual recognition principle subject to exception that it does not affect operation of laws that regulate manner of carrying on occupation in second State, provided laws not based on attainment or possession of some qualification or experience relating to fitness to carry on occupation – Where respondent registered as waterproofer in first State – Where respondent refused registration in second State for non-compliance with "good character" requirement in local Act – Whether local registration authority has discretion to refuse registration – Whether "good character" requirement is law based on "qualification" relating to fitness to carry on occupation.

Words and phrases – "character requirement", "disciplinary action", "discretionary power", "entitlement to registration", "fitness to carry on an occupation", "good character", "local registration authority", "may", "mutual recognition principle", "mutual recognition scheme", "qualification or experience", "registration for an occupation", "residual discretion", "sufficient ground of entitlement to registration".

Acts Interpretation Act 1901 (Cth), ss 2, 13, 15AA, 33.
Building Act 1993 (Vic), ss 170, 179, 180.
Mutual Recognition Act 1992 (Cth), ss 3, 6, 16, 17, 19, 20, 21, 22, 23, 33, 36, 37.

1 KIEFEL CJ, BELL AND KEANE JJ. The factual background and statutory provisions relevant to this appeal are set out in the reasons of Nettle and Gordon JJ. It is not necessary to repeat them in full.

2 This appeal concerns the operation of the *Mutual Recognition Act 1992* (Cth) ("the MRA"). The MRA was enacted pursuant to s 51(xxxvii) of the Commonwealth *Constitution*, which provides for the power of the Commonwealth legislature "to make laws for the peace, order, and good government of the Commonwealth with respect to … matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States". The relevant referrals by the States and the requests by the legislatures of the Territories followed upon an intergovernmental agreement between the Commonwealth, the States and the Territories[1] concerning mutual recognition.

3 The principal purpose of the MRA is to promote the goal of freedom of movement of goods and service providers in a national market in Australia[2]. That goal is sought to be achieved by providing for the recognition within each State and Territory of the Commonwealth of regulatory standards adopted elsewhere in Australia regarding goods and occupations, as the MRA's long title suggests. Part 2 of the MRA deals with goods produced in or imported into a State and their sale in another State[3]. Part 3 is concerned with the ability of a person who is registered in connection with an occupation in a State to carry on an equivalent occupation in another State[4].

4 The entitlement of a person registered in one State ("the first State") to carry on an occupation in another State ("the second State") is stated in the "mutual recognition principle" in s 17(1) of the MRA. It is to the effect that after the person notifies the local registration authority of the second State of his or her registration in the first State, the person is (a) entitled to be registered in the second State for the equivalent occupation; and (b) pending that registration, entitled to carry on the equivalent occupation in the second State.

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1 *Coca-Cola Amatil (Aust) Pty Ltd v Northern Territory* (2013) 215 FCR 377 at 381-382 [13] per Griffiths J.

2 MRA, s 3; see also *Trans-Tasman Mutual Recognition Act 1997* (Cth).

3 MRA, s 8(2).

4 MRA, s 16(2).

5 Section 19 enables a person who is registered in the first State to lodge a written notice with the local registration authority in the second State seeking registration for the equivalent occupation[5]. The notice is required to contain certain statements, including that the person is not the subject of disciplinary proceedings or preliminary investigations or action which might lead to such proceedings, that the person's registration in any State is not cancelled or suspended, and that the person is not otherwise prohibited from carrying on the occupation in any State, and a statement specifying any special conditions to which the person is subject in carrying on such occupation in any State[6].

6 Registration must be granted within one month after the notice is lodged and takes effect from the date of the notice[7]. However, the local registration authority has power, within one month after the notice is lodged, to postpone or refuse the grant of registration[8]. If a grant is postponed, the authority may later refuse registration[9]. The circumstances in which a grant may be postponed or refused are set out in ss 22(1) and 23(1). The circumstances in which a grant of registration may be refused under s 23(1) are that: any of the statements or information in the notice as required by s 19 are materially false or misleading; any document or information required by s 19(3) has not been provided or is materially false or misleading; or the authority decides that the occupation in which registration is sought has no equivalent and equivalence cannot be achieved by the imposition of conditions.

7 Section 20(1) provides that a person who lodges a notice under s 19 is entitled to be registered in the equivalent occupation in the second State "as if the law of the second State that deals with registration expressly provided that registration in the first State is a sufficient ground of entitlement to registration". Section 20(2) then provides that the local registration authority "may grant registration on that ground and may grant renewals of such registration".

8 The respondent, Mr Andriotis, notified the Victorian Building Practitioners Board ("the Board"), the then relevant local registration authority, that he was the holder of an "Endorsed Contract Licence – Waterproofing" which

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5 MRA, s 19(1).

6 MRA, s 19(2)(d)-(g).

7 MRA, s 21(1), (2).

8 MRA, s 21(3).

9 MRA, s 22(2).

had been issued in New South Wales. He sought registration as a waterproofer in Victoria.

9 The mutual recognition principle in s 17(1) is expressed to be subject to Pt 3. If no other provision of Pt 3 created any impediment it would seem to follow from the principle and ss 20(1) and 20(2) that Mr Andriotis would have been entitled to be registered in Victoria as a waterproofer. There is no suggestion that he did not meet the requirements for notification in s 19 or that any of the bases for refusal of registration given by s 23 were present.

10 If Mr Andriotis had applied for registration as a "Domestic Builder Class W – Waterproofing" under the *Building Act 1993* (Vic), rather than under the MRA, he would have been required by s 170(1)(c) of the *Building Act* to satisfy the Board that he was a person "of good character". The Board refused to register Mr Andriotis under the MRA on that ground. The Administrative Appeals Tribunal affirmed that decision[10]. The Board was subsequently abolished[11]. Its decisions are taken to be those of the appellant, the Victorian Building Authority ("the VBA")[12].

11 On Mr Andriotis' appeal to a Full Court of the Federal Court, the VBA argued that the MRA permits the approach adopted by its predecessor in ensuring that requirements of the *Building Act* were met by an applicant for registration under the MRA. It submitted that the VBA retains a discretion under s 20(2), not the least because the word "may" is used in relation to the grant of registration. The other argument advanced by the VBA relied on s 17(2) of the MRA.

12 Section 17(2) subjects the mutual recognition principle to an exception. The exception is "that it does not affect the operation of laws that regulate the manner of carrying on an occupation in the second State". The laws in question must satisfy two further conditions to come within the exception. They must apply equally to all persons "carrying on or seeking to carry on the occupation" under the law of the second State. They must not be based "on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation". The VBA argued that the requirement of s 170(1)(c) of the *Building Act*, that a person be of good character, is not a "qualification" relating

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10 *Andriotis and Building Practitioners Board* [2017] AATA 378.

11 *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic), s 17; *Building Act*, Sch 8, cl 3.

12 *Building Act*, Sch 8, cl 6.

to fitness to carry on an occupation so as to exclude it from the description of a law to which s 17(2) refers.

13 The Full Court (Flick, Bromberg and Rangiah JJ) rejected both arguments on the hearing of Mr Andriotis' appeal. In their Honours' view, s 20(2) does not connote a general discretionary power, and is to be understood as permissive[13] or enabling[14]. As to the second argument, their Honours held that there is no basis to read the word "qualification" in s 17(2) as excluding any consideration as to the integrity or moral characteristics of a person seeking registration[15].

14 The Full Court allowed the appeal, set aside the decision of the AAT and ordered that the matter be remitted to the AAT to be heard and determined according to law.

15 We agree with Nettle and Gordon JJ that the appeal to this Court should be dismissed with costs for the reasons which follow.

The exception in s 17(2)

16 The VBA's argument, that the good character requirement of s 170(1)(c) of the *Building Act* is exempt from the mutual recognition principle in s 17(1) of the MRA and the entitlement to registration which it states, raises two issues. The first is whether s 170(1)(c) is a law to which s 17(2) applies, which requires that the law not be based on a "qualification" relating to fitness (s 17(2)(b)). The second concerns the operation of s 17(2). It is whether a State law to which s 17(2) refers applies to a person seeking registration notwithstanding the mutual recognition principle or whether such a law applies only after registration. The VBA requires both issues to be determined in its favour in order to succeed on the appeal.

17 The VBA submits that s 170(1)(c) of the *Building Act* is a law falling within the exception to the mutual recognition principle because: (a) it is a law regulating the manner of carrying on an occupation; (b) it applies equally to all persons; and (c) it is not based on the attainment or possession of some

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13 *Andriotis v Victorian Building Authority* (2018) 359 ALR 427 at 452 [106] per Bromberg and Rangiah JJ.

14 *Andriotis v Victorian Building Authority* (2018) 359 ALR 427 at 445-446 [68] per Flick J.

15 *Andriotis v Victorian Building Authority* (2018) 359 ALR 427 at 442-443 [51] per Flick J, 449 [91], 450 [94] per Bromberg and Rangiah JJ.

qualification or experience relating to fitness to carry on the occupation. It may be accepted that the provision fulfils (a) and (b). The question is whether it meets the negative condition in (c), which reflects s 17(2)(b) of the MRA.

18 The term "qualification" is not defined in the MRA. It does appear in s 4(1), which defines "occupation" to mean an occupation, trade, profession or calling that may be carried on by registered persons, where registration is dependent on "the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper)".

19 The VBA submits that the definition of "occupation" should not be taken to control that of "qualification". The text of s 17(2)(b) suggests "qualification" has a narrower meaning than is given in s 4(1). It cannot have the same meaning as in the definition of "occupation" because the latter includes "experience" as a qualification, whereas s 17(2)(b) treats "experience" as different from a qualification in its reference to "qualification or experience". This would suggest that "qualification" is intended to refer merely to an academic or other educational or technical qualification, as was held in *Re Director-General of Health (Cth); Ex parte Thomson*[16].

20 The context provided by Pt 3 also indicates a narrow meaning of "qualification" in s 17(2)(b) which does not extend to character, the VBA submits. The same phrase is used in s 20(4), which provides that continuation of registration is subject to the laws of the second State, which are described in the same way as in s 17(2). Such laws must not be based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation. If "qualification or experience" is construed to extend to character requirements, it would produce the absurd and unintended consequence that a person's registration in the second State could never be revoked on the basis that the person ceased to be of good character, the VBA contends. A harmonious reading of ss 17(2) and 20(4) requires a conclusion that s 17(2)(b) does not encompass requirements as to character.

21 The text of s 17(2)(b) does not support the VBA's submission. If only the words "qualification or experience" appeared there, there might be something to be said for the view that "qualification" is intended to refer to some technical qualification. The relevant provisions in *Thomson* required regard to be had to the "qualifications, experience and standing" of a medical practitioner in determining whether he or she be recognised as a specialist. But s 17(2)(b) contains a further description. It refers to a qualification or experience "relating

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16 (1976) 51 ALJR 180; 11 ALR 471.

to fitness to carry on the occupation". Not only do these words suggest a broader meaning than that a qualification be of an educational or technical kind, they clearly encompass the subject matter of s 170(1)(c) of the *Building Act*, namely whether a person is of good character and therefore fit to carry on the occupation. The evident purpose of the enquiry under the *Building Act* is to determine whether the person has that inherent characteristic or quality.

22 So understood, the meaning of "qualification" in s 17(2)(b) is consistent with that appearing in the definition of "occupation". Indeed, were the text of s 17(2)(b) itself not so clear, one would wonder why the definition of "occupation" in s 4(1) would not be useful as an aid to construction. It may not itself provide a definition of "qualification" but it gives examples of what may be taken to fall within that description and "character or being fit or proper" are included amongst them in addition to "education" and "experience". This is understandable since these characteristics would generally be understood to be requirements of most occupations, unless the context suggested otherwise such as in *Thomson*. The examples given in s 4(1) should be taken to indicate that the term "qualification" when it is used in the MRA is to have a broader meaning than as relates to education.

23 A construction of s 17(2)(b) which excludes a law which allows a local registration body to determine the question of the fitness of a person to carry on an occupation as a prerequisite to registration is consistent with the scheme of the MRA and the mutual recognition principle on which it is founded.

24 The mutual recognition principle accepts that registration for an occupation in the first State is sufficient for registration in the second State, without any further requirements of the laws of the second State being fulfilled. Were it otherwise, the primary purpose of the MRA would be substantially undermined.

25 This understanding of the operation of the mutual recognition principle is confirmed by s 20(1), which speaks of an entitlement to be registered in the second State on notification of registration in the first State, and of the law of the second State being taken to accept that as a sufficient ground for registration. A State Act such as the *Building Act* is, by s 20(1), to be understood to so provide.

26 The fact that, when granted, registration takes effect as from the date of notice[17] further confirms, if that were necessary, that notification of registration is the basis for the entitlement. It does not suggest as necessary any further

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17 MRA, s 21(2).

consideration of matters which it may be expected the first State has addressed when granting registration, such as fitness or suitability for the occupation. This is borne out by what was said in the Second Reading Speech of the Bill that became the MRA[18]:

> "A person will only need to give notice ... to be entitled immediately to commence practice in an equivalent occupation in that second State or Territory. Local registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practise."

27 This is not to say that the local registration authority of the second State is unable to make any enquiries. By s 19(2)(h) a person is required to consent to that taking place and to exchanges of information between the authorities of any States. But these enquiries can only be directed to the exercise of the powers given by the MRA to the local registration authority of the second State other than that to grant registration. They are the powers to postpone or refuse registration[19] or to condition it[20]. The powers to postpone or refuse registration are limited to the circumstances outlined above.

28 The VBA submits that a person registered in the first State cannot be said to have an absolute entitlement to registration. This may be seen by the operation of s 17(2) with respect to a State law. The VBA gives as an example s 169(2)(e)(i) of the *Building Act*, which requires an applicant for registration under that Act to prove that they have insurance cover. Section 17(2) would permit that requirement to be imposed.

29 The answer to the submission lies in the power given by the MRA to the local registration authority of the second State to condition registration under s 20(5). It may do so as long as the conditions are not more onerous than would be imposed in similar circumstances. The use of that power to condition would be consistent with the scheme of the MRA; satisfaction of a requirement of a State Act as a precondition to a grant would not.

30 The VBA also argues that a construction of the MRA contrary to that for which it contends would have the unintended consequence that a person's

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18 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2433.

19 MRA, ss 22, 23.

20 MRA, s 20(5).

registration in the second State could never be revoked under s 20(4) of the MRA on the basis of the person ceasing to be of good character. The submission cannot be accepted if it implies that the second State is powerless to discipline persons having regard to their conduct in the course of their occupation.

31 It is unlikely that legislation regulating occupations will contain an express requirement of the maintenance of good character or permit an authority to examine or review a person to ascertain its continued presence. The *Building Act* for example contains no such provision. It does contain provisions by which persons coming within its purview may be subjected to disciplinary proceedings if their conduct breaches the standards imposed by the Act[21]. Section 20(4) of the MRA expressly subjects the continuance of a person's registration to the laws of the second State and therefore to a law of this kind.

32 A law which sets standards to be met by persons carrying on an occupation in the second State following registration under the MRA and which enables that person to be disciplined if a standard of conduct is breached is not a law which falls within the exception in s 20(4)(b). It is not a law which involves an assessment of a person's good character as such, a matter which is left to the first State to undertake if necessary prior to registration. The MRA makes notice the basis for registration as a person entitled to carry on an occupation. It does not leave the person to do so unregulated by the second State. Section 33(1) of the MRA contemplates the possibility that the person's registration may be cancelled or suspended by a local registration authority in either State. It provides that if a person's registration is cancelled or suspended on disciplinary grounds, the person's registration in the equivalent occupation in any other State is affected in the same way.

33 It is strictly not necessary to consider the VBA's argument that a law to which s 17(2) refers can be applied by the local registration authority at the point of grant or refusal of registration. Section 170(1)(c) of the *Building Act* is not such a law because it is a law which is based on the possession of a qualification relating to fitness to carry on an occupation. However, the VBA submits that the joint judgment in the Full Court held, in effect, that s 17(2) does not qualify s 17(1) and the power to grant registration in s 20(2) but instead operates only upon laws regulating the "post-registration carrying on of an occupation"[22]. Something more should be said about that.

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21 *Building Act*, s 179.

22 *Andriotis v Victorian Building Authority* (2018) 359 ALR 427 at 454 [113] per Bromberg and Rangiah JJ.

34 The VBA submits that the language of s 17(2)(a) indicates that s 17(2) is intended to have operation in the field of registration and not simply the subsequent carrying on of the occupation. Section 17(2)(a) requires a law to apply equally to "all persons carrying on or seeking to carry on the occupation". The VBA points to the words "seeking to carry on" as referable to an applicant for registration under the MRA.

35 The difficulty with the submission is that it does not correctly identify the persons to whom s 17(2)(a) refers. They are not persons who are applicants for registration under the MRA, but rather those who are either carrying on the occupation under the law of the second State (which is to say persons who are registered under that State law), or seeking registration under the law of the second State. Section 17(2)(a) requires the State law which is to be excepted from the mutual recognition principle to be non-discriminatory in its application.

36 As to the broader question, it is no doubt generally correct to observe that State laws to which s 17(2) refers will operate to regulate the occupation carried on by the person after registration, as s 20(4) confirms. This is subject to the qualification that State laws operating by force of s 17(2) may also operate pending registration. It is to be recalled that the mutual recognition principle entitles a person who notifies the local registration authority of his or her registration in the first State to carry on the equivalent occupation in the second State pending registration. Section 17(2) permits laws regulating the manner of carrying on an occupation in the second State to operate in that short period.

A discretion?

37 The VBA's argument that the MRA admits of some residual discretion in a local registration authority to refuse registration on a ground other than as provided by the MRA is not one which is consistent with the scheme of the MRA. It may be dealt with shortly.

38 The discretion for which the VBA contends is said not to be a general discretion, but rather a narrow one confined by the context of the MRA. The VBA does not explain how the limits to such a discretion might be identified, save by its reference to the potential harmful consequences of an interpretation that compels registration of a person unfit to carry on an occupation. It does not explain how the discretion can exist conformably with the legislative scheme and its express provisions.

39 It is difficult to accept that any kind of discretion to refuse a grant of registration could exist in a scheme which provides a rule by which an entitlement to a grant of registration arises on fulfilment of the notification provisions and where power is given to a local registration authority to refuse

registration on limited grounds relating to the provision of false and misleading information in the notice or the lack of an equivalent occupation. It is especially difficult when it is expressly provided that the law of the second State is to be taken to accept registration in the first State as a sufficient ground of entitlement to registration under the MRA.

40 The VBA, however, submits that the language of s 20(2) falls short of compelling registration. Its language is indirect. If it had the effect that a person must be registered subject only to the power in s 23 to refuse a grant there would be no work for s 20(2) to do.

41 There is little ambiguity about what s 20(1) does. Consistently with the mutual recognition principle, it creates an entitlement for a person to be registered in an equivalent occupation where that person lodges a notice under s 19. Registration is granted on the "ground" referred to above, namely registration in the first State. An Act such as the *Building Act* is to be understood to say that that is a sufficient ground of entitlement to registration.

42 Central to the VBA's argument is that the use of the word "may" necessarily imports some discretion. It relies upon s 33(2A) of the *Acts Interpretation Act 1901* (Cth), which provides that where it is provided "that a person, court or body may do a particular act or thing, and the word ***may*** is used, the act or thing may be done at the discretion of the person, court or body".

43 The VBA presses this as an absolute rule of construction. But of course s 33(2A) is subject to any contrary intention appearing in the process of construction[23]. Most commonly such an intention will arise by reference to the context in which the word is used. A particular context may make "may" a simple empowering word and indicate the circumstances in which the power is to be exercised[24]. That is the case here.

44 Section 20(2) gives a local registration authority power to grant registration under the MRA on one "ground", the ground referred to in s 20(1), namely registration in the first State. No other ground is provided. There is no room for the operation of a discretion when a person notifies the authority of that registration. That is the scheme of the MRA. The word "may" must be understood in context to be the grant of a power to register on that one ground and no more.

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23 *Acts Interpretation Act 1901* (Cth), s 2(2).

24 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134; [1971] HCA 12.

45 The VBA's reliance upon the decision in *Re Petroulias*[25] and the cases which follow it[26], as accepting that the MRA admits of some discretion in a local registration authority to refuse a grant to which a person is otherwise entitled under the MRA, is misplaced.

46 In *Re Petroulias* the applicant for admission as a legal practitioner did not make the declaration required by s 19(2)(d) of the MRA, that he was not the subject of any investigation in another State which might lead to disciplinary proceedings. He could not do so because he was in fact the subject of such an investigation, but he made no mention of it. De Jersey CJ held that because the applicant did not accurately verify the statutory declaration his notice did not meet the requirements of s 19. The entitlement to registration did not therefore crystallise. Davies JA preferred to view the applicant's silence as materially false and misleading for the purposes of the postponement or refusal powers (ss 22 and 23 of the MRA).

47 In *Re Petroulias* the Court of Appeal of Queensland also expressed the view that the court retained its inherent jurisdiction respecting the admission of lawyers regardless of the MRA. This is a view that has been adopted by other courts. The correctness of it does not arise for consideration on this appeal. A view about the co-existence of a superior court's inherent jurisdiction and the MRA does not avail the VBA's argument for a more general discretion.

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25 [2005] 1 Qd R 643.

26 *Re Tkacz; Ex parte Tkacz* (2006) 206 FLR 171; *Scott v Law Society of Tasmania* [2009] TASSC 12.

48 GAGELER J. The ultimate question in this appeal, from a judgment of the Full Court of the Federal Court[27] setting aside on appeal a decision of the Administrative Appeals Tribunal[28] which had affirmed on review a decision of the Victorian Building Practitioners Board ("the VBPB"), is whether it is open to a local registration authority under the *Mutual Recognition Act 1992* (Cth) ("the MRA") to refuse to register for an equivalent occupation in its own State a person who is registered for an occupation in another State on the basis that the local registration authority has reached the conclusion that the person is "not of good character".

49 My opinion is that the Full Court of the Federal Court was correct to answer that question in the negative, and that the Full Court was correct, in arriving at that answer, to reject arguments of the Victorian Building Authority (the successor to the VBPB) that a local registration authority can refuse registration on the ground that a person is not of good character either as an incident of the exception to the mutual recognition principle expressed in s 17(2) of the MRA or in the exercise of the discretion conferred by s 20(2).

50 My reasons, which follow, are explained in stages. First, I examine the origin and purpose of the MRA. Next, I outline its structure. Then I explain specifically and in turn how and why I make particular constructional choices presented by the language of each of ss 17(2) and 20(2) of the MRA. The reasons for judgment of Nettle and Gordon JJ, with the substance of which I agree, relieve me of any need to set out the facts or procedural history.

Origin and purpose of the MRA

51 The Prime Minister, the Premier of each State and the Chief Minister of each self-governing Territory in 1992 established the Council of Australian Governments ("COAG") as an ongoing body for consultation between them[29]. One of the first acts of COAG was to enter into an intergovernmental agreement for the establishment of a national mutual recognition scheme[30]. The scheme had earlier been outlined in a discussion paper on mutual recognition circulated under

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27 *Andriotis v Victorian Building Authority* (2018) 359 ALR 427.

28 *Andriotis and Building Practitioners Board* [2017] AATA 378.

29 *Communique*, Heads of Government Meeting, Canberra, 11 May 1992.

30 Agreement Relating to Mutual Recognition Between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia, 11 May 1992.

the authority of a Special Premiers' Conference[31]. Commencing in 1993, the MRA implemented the national mutual recognition scheme, and was followed by complementary State and Territory legislation[32].

52 Formulated soon after landmark decisions of this Court which reinterpreted the imperatives of s 92 of the *Constitution* that "trade, commerce, and intercourse among the States ... shall be absolutely free"[33] and of s 117 of the *Constitution* that a resident in one State "shall not be subject in any other State to any disability or discrimination which would not be equally applicable" if that resident were resident in the other State[34], the national mutual recognition scheme was an exercise in "co-operative federalism"[35]. The scheme was formulated to achieve structural microeconomic reform at a national level with the support of the States and the self-governing Territories through the exercise of the legislative powers conferred on the Commonwealth Parliament by ss 51(xxxvii) and 122 of the *Constitution*. The Minister for Science and Technology and Minister Assisting the Prime Minister described it on the second reading of the Bill for the MRA in the House of Representatives as involving "a recognition by heads of government that the time [had] come for Australia to create a truly national market – a goal which the founding fathers of this nation enshrined in the Constitution but which the parochial politics of successive State and Territory governments [had] frustrated for almost 100 years"[36].

53 The national mutual recognition scheme has since been substantially replicated in the trans-Tasman mutual recognition scheme to which effect is

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31 Special Premiers' Conference, *The Mutual Recognition of Standards and Regulations in Australia: A Discussion Paper* (1991) at 5-9 [6.2.1]-[6.3.6].

32 *Mutual Recognition (Australian Capital Territory) Act 1992* (ACT); *Mutual Recognition (New South Wales) Act 1992* (NSW); *Mutual Recognition (Northern Territory) Act 1992* (NT); *Mutual Recognition (Queensland) Act 1992* (Qld); *Mutual Recognition (South Australia) Act 1993* (SA); *Mutual Recognition (Tasmania) Act 1993* (Tas); *Mutual Recognition (Victoria) Act 1993* (Vic); *Mutual Recognition (Victoria) Act 1998* (Vic); *Mutual Recognition (Western Australia) Act 1995* (WA); *Mutual Recognition (Western Australia) Act 2001* (WA); *Mutual Recognition (Western Australia) Act 2010* (WA).

33 See *Cole v Whitfield* (1988) 165 CLR 360; [1988] HCA 18.

34 See *Street v Queensland Bar Association* (1989) 168 CLR 461; [1989] HCA 53.

35 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 556 [54]; [1999] HCA 27.

36 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2432.

given in Australia by the *Trans-Tasman Mutual Recognition Act 1997* (Cth) ("the TMRA") and complementary State and Territory legislation[37]. Effect is given to the scheme in New Zealand by the *Trans-Tasman Mutual Recognition Act 1997* (NZ).

54 Reflecting the ambition of those who framed the national mutual recognition scheme finally to create a truly national market, the MRA explains that its principal purpose "is to enact legislation authorised by the Parliaments of States under paragraph (xxxvii) of section 51 of the Commonwealth Constitution, and requested by the legislatures of the Australian Capital Territory and the Northern Territory, for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia"[38]. To the extent that the provisions of the MRA give rise to constructional choice, the interpretation that would allow the MRA best to achieve that purpose must be preferred to each other interpretation[39].

55 Insight into the basic design which the MRA adopts in the implementation of the national mutual recognition scheme to promote the goal of freedom of movement of goods and service providers in a national market in Australia is provided by the long title to the MRA[40]. The long title describes it as an "Act to provide for the recognition within each State and Territory of the Commonwealth of regulatory standards adopted elsewhere in Australia regarding goods and occupations". The description provides the greatest illumination when it is read together with the MRA's definitions of "goods" and of "occupation": "goods" encompass "goods of any kind"[41], and "occupation" encompasses "an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or

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37 *Trans-Tasman Mutual Recognition (New South Wales) Act 1996* (NSW); *Trans-Tasman Mutual Recognition Act 1997* (ACT); *Trans-Tasman Mutual Recognition Act 1998* (NT); *Trans-Tasman Mutual Recognition (Victoria) Act 1998* (Vic); *Trans-Tasman Mutual Recognition (South Australia) Act 1999* (SA); *Trans-Tasman Mutual Recognition (Queensland) Act 2003* (Qld); *Trans-Tasman Mutual Recognition (Tasmania) Act 2003* (Tas); *Trans-Tasman Mutual Recognition (Western Australia) Act 2007* (WA).

38 Section 3 of the MRA.

39 Section 15AA of the *Acts Interpretation Act 1901* (Cth).

40 See s 13(2)(a) of the *Acts Interpretation Act 1901* (Cth).

41 Section 4(1) of the MRA (definition of "goods").

possession of some qualification (for example, training, education, examination, experience, character or being fit or proper)"[42].

56 Expressed in the MRA's long title when read together with those definitions is the underlying premise of the national mutual recognition scheme: that regulatory standards adopted in any one State or Territory are generally satisfactory to be adopted in any other State or Territory. That is so for regulatory standards applicable to service providers as for regulatory standards applicable to goods. On that premise, as the Minister explained in his second reading speech[43]:

> "The legislation is based on two simple principles. The first is that goods which can be sold lawfully in one State or Territory may be sold freely in any other State or Territory even though the goods may not comply with all the details of regulatory standards in the second State or Territory: if goods are acceptable for sale in one State or Territory, then there is no reason why they should not be sold anywhere in Australia.
>
> ...
>
> The second principle is that, if a person is registered to carry out an occupation in one State or Territory, then he or she should be able to be registered and carry on the equivalent occupation in any other State or Territory:
>
> > If someone is assessed to be good enough to practise a profession or occupation in one State or Territory, then they should be able to do so anywhere in Australia.
>
> A person will only need to give notice, including evidence of his home registration, to the relevant registration authority in another jurisdiction to be entitled immediately to commence practice in an equivalent occupation in that second State or Territory. Local registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practise."

57 The MRA is structured to give effect to each of those two principles in ways that bear out that explanation.

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42 Section 4(1) of the MRA (definition of "occupation").

43 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2433.

Structure of the MRA

58 The MRA is divided into four Parts. Part 1 is preliminary. As well as containing a definition of "State", which includes the Australian Capital Territory and the Northern Territory[44], and the definitions of "goods" and of "occupation" already noted, it relevantly contains definitions of "registration" and of "local registration authority" of a State for an occupation. The former is defined to include any form of authorisation required of a person by or under legislation for carrying on an occupation[45]. The latter is defined to mean "the person or authority in the State having the function conferred by legislation of registering persons in connection with their carrying on that occupation in the State"[46]. Part 4 is general, relevantly containing in s 44(1) provision to the effect that "[t]he mutual recognition principle and the provisions of this Act may be taken into consideration in proceedings of any kind and for any purpose".

59 Part 2 is headed "Goods". The Part commences with the explanation in s 8 that "[t]he mutual recognition principle as applying to goods is as set out in this Part" and with the further explanation that it "deals with goods produced in or imported into a State [called 'the first State'] and their sale in another State [called 'the second State']". Section 9 then states:

> "The mutual recognition principle is that, subject to this Part, goods produced in or imported into the first State, that may lawfully be sold in that State either generally or in particular circumstances, may, because of this Act, be sold in the second State either generally or in particular circumstances (as the case may be), without the necessity for compliance with further requirements as described in section 10."

The remaining provisions of Pt 2, including s 10 (which, as foreshadowed in s 9, describes "further requirements" that do not need to be complied with if goods are to be sold in the second State), are devoted to the explication and qualification of the mutual recognition principle as applying to goods stated in s 9.

60 Part 3 is headed "Occupations". The Part is divided into five Divisions. Division 1, headed "Preliminary", mirrors Pt 2 in commencing in s 16 with the explanation that "[t]he mutual recognition principle as applying to occupations is as set out in this Part" and the further explanation that the Part "deals with the ability of a person who is registered in connection with an occupation in a State

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44 Section 4(1) of the MRA (definition of "State").

45 Section 4(1) of the MRA (definition of "registration").

46 Section 4(1) of the MRA (definition of "local registration authority").

[called 'the first State'] to carry on an equivalent occupation in another State [called 'the second State']". Within Div 1, s 17 then states:

> "(1) The mutual recognition principle is that, subject to this Part, a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:
>
> (a) to be registered in the second State for the equivalent occupation; and
>
> (b) pending such registration, to carry on the equivalent occupation in the second State.
>
> (2) However, the mutual recognition principle is subject to the exception that it does not affect the operation of laws that regulate the manner of carrying on an occupation in the second State, so long as those laws:
>
> (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and
>
> (b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation."

61 Division 2 of Pt 3 is headed "Entitlement to registration". It commences with s 19, which provides that "[a] person who is registered in the first State for an occupation may lodge a written notice with the local registration authority of the second State for the equivalent occupation, seeking registration for the equivalent occupation in accordance with the mutual recognition principle"[47]. The section goes on to specify the contents of the notice[48], to require the notice to be accompanied by a certified document evidencing the person's existing registration[49], and to require the statements and information in the notice to be verified by statutory declaration[50]. To be included in the notice, amongst other things, are statements that the person "is registered for the occupation in the first

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47 Section 19(1) of the MRA.

48 Section 19(2) of the MRA.

49 Section 19(3)-(4) of the MRA.

50 Section 19(5) of the MRA.

State"[51], "is not the subject of disciplinary proceedings in any State" in relation to the occupation[52], and "give[s] consent to the making of inquiries of, and the exchange of information with, the authorities of any State ... regarding matters relevant to the notice"[53].

62 Pivotal to the operation of Div 2, and with s 17 central to the issues in the appeal, is s 20. So far as it has the potential to bear on the issues in the appeal, s 20 provides:

> "(1) A person who lodges a notice under section 19 with a local registration authority of the second State is entitled to be registered in the equivalent occupation, as if the law of the second State that deals with registration expressly provided that registration in the first State is a sufficient ground of entitlement to registration.
>
> (2) The local registration authority may grant registration on that ground and may grant renewals of such registration.
>
> ...
>
> (4) Continuance of registration is otherwise subject to the laws of the second State, to the extent to which those laws:
>
> (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and
>
> (b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.
>
> ...
>
> (6) This section has effect subject to this Part."

63 Following on from s 20 within Div 2 are then ss 21, 22 and 23. Understanding their combined operation is critical to understanding the scope and operation of the power conferred on a local registration authority by s 20(2) to grant registration on the ground identified in s 20(1) to a person who has lodged a notice under s 19.

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51 Section 19(2)(a) of the MRA.

52 Section 19(2)(d) of the MRA.

53 Section 19(2)(h) of the MRA.

64 Sections 21 and 22 are addressed essentially to the timing of the exercise of the power to grant registration. Section 21 provides that registration "must be granted within one month after the notice is lodged with the local registration authority under section 19"[54], subject to the qualification that "the local registration authority may, subject to this Part and within one month after the notice was lodged, postpone or refuse the grant of registration"[55]. Section 22 sets out circumstances in which a local registration authority "may postpone the grant of registration". Those circumstances are expressed to include that any statement or information in the notice required by s 19 or any document required to accompany it is materially false or misleading[56]. However, "[t]he local registration authority may not postpone the grant of registration for longer than a period of 6 months, and the person is entitled to registration immediately at the end of that period, unless registration was refused at or before the end of that period"[57].

65 Section 23 is addressed to circumstances in which a local registration authority "may refuse the grant of registration". The circumstances in which refusal is permitted under s 23 overlap with those in which postponement is permitted under s 22 in that they are expressed to include that any statement or information in the notice required by s 19 or any document required to accompany it is materially false or misleading[58].

66 Division 3 of Pt 3 is headed "Interim arrangements". Within Div 3, s 25 provides that, pending grant or refusal of registration under Div 2, a person who lodges a notice under s 19 is taken to be registered in the second State[59]. By force of s 26, that "deemed registration"[60] ceases when the person is either granted or refused actual registration under Div 2[61].

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54 Section 21(1) of the MRA.

55 Section 21(3) of the MRA.

56 Section 22(1)(a) and (b) of the MRA.

57 Section 22(3) of the MRA.

58 Section 23(1)(a) and (b) of the MRA.

59 Section 25(1) of the MRA.

60 Section 25(2) of the MRA.

61 Section 26(2) and (3) of the MRA.

67 Division 4 of Pt 3 is concerned only with determination of equivalence of occupations for the purposes of the Part and can for present purposes be ignored. Division 5 contains provisions of a general nature only two of which need be noted. One is s 34(1), which provides for an application for review of a decision of a local registration authority to be made to the Administrative Appeals Tribunal. The other is s 33(1), which relevantly provides that cancellation or suspension of a person's registration in one State on "disciplinary grounds" affects the person's registration in the equivalent occupation in another State in the same way.

Section 17(2) of the MRA

68 Legislative expression of a principle, as distinct from legislative statement of a command, legislative prescription of a right or an obligation, or legislative statement of a purpose or an object, is a form of drafting not often encountered in Australian legislation. In some contexts, a principle can be a guide to statutory interpretation or a consideration to be taken into account in curial or administrative decision-making. In other contexts, a principle can be a statutory rule that forms a fundamental tenet of the statutory scheme of which it forms part.

69 Plainly enough, the mutual recognition principle as applying to goods set out in s 9 of the MRA is a statutory rule. And plainly enough, if the mutual recognition principle as applying to goods set out in s 9 of the MRA is a statutory rule, then the mutual recognition principle as applying to occupations set out in s 17 of the MRA is also a statutory rule. Section 44 makes clear that the mutual recognition principle as applying to goods and the mutual recognition principle as applying to occupations are iterations of the same principle.

70 Expression of the mutual recognition principle in the MRA and its complementary State and Territory legislation, as it applies to goods and as it applies to occupations, is the expression of a statutory rule that forms a fundamental tenet of the statutory scheme of which it forms part. The terminology is explicable by reference to the quasi-constitutional status of the mutual recognition scheme which that legislation implements. The terminology serves to highlight the breadth of application and the structural importance of the legal entitlement which each iteration of the mutual recognition principle operates legislatively to confer.

71 Harmoniously with the expression in s 9 of the MRA of the mutual recognition principle as applying to goods, the expression in s 17 of the MRA of the mutual recognition principle as applying to occupations must therefore be read as having an immediate legal operation. The extent of that immediate legal operation, however, can be discerned only by interpreting each of those expressions of the mutual recognition principle to confer an entitlement the

content of which accords with the detail of the provisions of the Part of the MRA in which the particular expression of the mutual recognition principle is located.

72 The entitlement of a person who is registered for an occupation in one State to obtain registration for an equivalent occupation in another State – which s 17(1)(a) operates to confer – is, accordingly, an entitlement the content of which must be understood to conform to the entitlement that is worked through in the detailed provisions of Div 2 of Pt 3. The entitlement of the person to carry on the equivalent occupation in the second State pending registration – which s 17(1)(b) operates to confer – is, correspondingly, an entitlement the content of which must be understood to conform to the entitlement that is worked through in the detailed provisions of Div 3 of the same Part.

73 That which s 17(2) refers to as an "exception" to the mutual recognition principle as applying to occupations must be understood to operate congruently. Its operation is not as a detraction from the content of the entitlements to registration conferred by s 17(1)(a) and to carry on the equivalent occupation conferred by s 17(1)(b). Its operation is as a clarification of the extent of the entitlements conferred by s 17(1)(a) and (b) that again conform to the detail of Divs 2 and 3 of Pt 3 and that, in particular, conform to the provision for the continuance of registration in s 20(4). The laws that regulate the manner of carrying on an occupation in the second State, which s 17(2) operates to ensure are not affected by the mutual recognition principle as applying to occupations, must be understood to be laws that regulate the carrying on of the occupation by a person who is registered in the second State in fulfilment of the entitlement conferred by s 17(1)(a) or (b) and to include laws that can affect the continuance of that registration.

74 Registration for an equivalent occupation in a second State comes about under s 20(2) of the MRA through the outworking of the fiction in s 20(1) that the law of the second State that deals with registration expressly provides that registration in the first State is a sufficient ground of entitlement to registration. Section 17(2) simply does not speak to that entitlement to registration.

75 What s 17(2) does in combination with s 20(4) is to move forward from the point of registration under s 20(2) (on the fiction that registration has occurred in the second State as if the law of the second State that dealt with registration expressly provided that registration in the first State was a sufficient ground of entitlement to registration) to make clear that a law of the second State that regulates the manner of carrying on an occupation in the second State operates to affect the continuance of that registration. The provisions combine in that way to facilitate cancellation or suspension by the local registration authority of the second State of registration that has occurred under s 20(2) in the exercise by the local registration authority of a power conferred by a law of the second State to cancel or suspend registration on what s 33(1) of the MRA refers to as "disciplinary grounds". If that occurs, then registration in the equivalent

occupation in another State is automatically and by force of s 33(1) to be affected in the same way.

76 Sections 17(2) and 20(4) also combine to make clear, however, that no law of the second State can affect the continuance of the registration that has occurred under s 20(2) of the MRA unless that law meets the two prerequisites spelt out in identical terms in ss 17(2)(a) and 20(4)(a) and in ss 17(2)(b) and 20(4)(b) respectively. By operation of ss 17(2)(a) and 20(4)(a), the law of the second State must have equal application to all persons carrying on or seeking to carry on the equivalent occupation under the law of the second State: the law cannot discriminate against an out-of-State registrant.

77 By the added operation of ss 17(2)(b) and 20(4)(b), in order to affect the continuance of that registration in the second State, the law of the second State must not be "based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation". That additional requirement cannot be interpreted otherwise than in light of that part of the definition of "occupation" which links carrying on an occupation to a requirement for registration that is "wholly or partly dependent on the attainment or possession of some qualification" of which the definition specifically gives "training, education, examination, experience, character or being fit or proper" as examples. The minor textual variance that "experience" is separated from "qualification" in ss 17(2)(b) and 20(4)(b) and that "experience" is given as an example of "qualification" in the definition of "occupation" is of no moment.

78 Sections 17(2)(b) and 20(4)(b) as so interpreted combine to ensure that a law of the second State which regulates the manner of carrying on an occupation in the second State has no application to the continuance of a person's registration under s 20(2) of the MRA in the second State if, and to the extent that, the law requires or allows discontinuance of registration in the second State to be based on the registrant possessing or not possessing some experience or qualification of which training and education, as well as character and being fit or proper, are each examples.

79 The result is that questions as to the continuing qualification of a person to engage in an occupation for which the person has been registered in the second State – including questions as to the person's continuing good character or continuing fitness or propriety to engage in the occupation – are questions which the local registration authority of the second State has no authority to decide. Questions of that nature must be left by the local registration authority of the second State to be answered by the local registration authority of the first State.

80 The result accords with the generality of the already quoted explanation in the Minister's second reading speech that "[l]ocal registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practise".

81 The result also accords with the detail of the proposed mutual recognition scheme that was foreshadowed in the discussion paper on mutual recognition which preceded COAG entering into the intergovernmental agreement for the establishment of the national mutual recognition scheme. The discussion paper explained the elements of the scheme to include that practitioners registered under it would be "subject to the conditions for delivery of services in the jurisdiction in which the service is provided" and added[62]:

> "Disciplinary action would be taken by the registering authority in the jurisdiction in which the breach occurred and would automatically apply to all other jurisdictions. Disciplinary action could only be taken in reference to matters of actual service delivery, not in reference to the right to practise or the need for registration in the place where the breach occurs."

82 Placing the express purpose of the MRA, relevantly of promoting the goal of freedom of movement of service providers in a national market in Australia, in an historical perspective serves to explain why the MRA would have been designed to ensure that a law of the second State providing for discontinuance of registration on the basis of a registrant's character or fitness or propriety has no application to continuance of registration for an occupation in the second State. Criteria making registration for an occupation dependent on character or fitness or propriety had existed in State legislation long before the establishment of a national mutual recognition scheme and had long been recognised to give a registration authority in a State "the widest scope for judgment and indeed for rejection"[63]. By reason of that wide and indefinite operation, criteria of that nature in State legislation purporting to regulate the manner of carrying on a trade within a State had been found to erect a practical barrier to entry by out-of-State traders and on that basis held to transgress the bounds of reasonable regulation of interstate trade[64].

83 The practical operation of the construction just expounded can be illustrated by reference to provisions of the *Building Act 1993* (Vic) in the form in which that Act has been argued by the Victorian Building Authority in its

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62 Special Premiers' Conference, *The Mutual Recognition of Standards and Regulations in Australia: A Discussion Paper* (1991), Technical Attachment at 11-12 [3.2.9]-[3.2.10].

63 *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 156; [1955] HCA 28.

64 eg, *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127 at 164-165, 187, 201, 203-204; *Boyd v Carah Coaches Pty Ltd* (1979) 145 CLR 78 at 84-86; [1979] HCA 56.

appeal to this Court to have had application to the decision of the Administrative Appeals Tribunal appealed to the Full Court.

84 The *Building Act* contained in s 170(1) a list of requirements to be met in respect of an applicant for registration as a building practitioner under that Act. The VBPB had under s 170(1) a duty to register the applicant if satisfied that all of the requirements were met, and under s 170(2) a discretion to refuse registration if not satisfied that all of the requirements were met. One of those requirements, listed in s 170(1)(c), was that the applicant be of "good character". Because s 17(2) of the MRA is not addressed to initial registration under s 20(2), s 17(2) did not operate to make any part of s 170 of the *Building Act* applicable to registration as a building practitioner under the MRA.

85 The *Building Act* also conferred by s 179(2) discretion on the VBPB to suspend or cancel registration as a building practitioner under that Act if the VBPB, on an inquiry into the conduct of the building practitioner, made any one or more of the findings for which provision was made in s 179(1). One of the findings which might trigger suspension or cancellation, for which provision was made in s 179(1)(a), was that the building practitioner had been "guilty of unprofessional conduct". Another of the findings which might trigger suspension or cancellation, for which provision was made in s 179(1)(da), was that the building practitioner had shown in certain information "that he or she [was] not a fit and proper person to practise as a building practitioner".

86 Section 17(2) of the MRA operated in conjunction with s 20(4) of the MRA to make s 179 of the *Building Act* generally applicable to the continuance of registration of a person registered under s 20(2) of the MRA as a building practitioner in Victoria. Accordingly, s 17(2) of the MRA operated in conjunction with s 20(4) of the MRA to confer discretion on the VBPB to suspend or cancel registration of a person registered as a building practitioner under s 20(2) of the MRA if the VBPB found in terms of s 179(1)(a) that the person had been "guilty of unprofessional conduct". The effect of the prerequisite in ss 17(2)(b) and 20(4)(b) was nevertheless to deprive the VBPB of discretion to suspend or cancel registration of a person registered as a building practitioner under s 20(2) of the MRA if the VBPB found in terms of s 179(1)(da) that the person was "not a fit and proper person to practise as a building practitioner".

Section 20(2) of the MRA

87 Subject always to a contrary legislative intention[65], use of the word "may" in Commonwealth legislation enacted after 1987[66] connotes conferral of "discretion"[67]. That the use of "may" in s 20(2) of the MRA connotes conferral of a discretion on a local registration authority can therefore be accepted. The "may" in s 20(2) is facultative and is not to be read as if it were "must".

88 But to accept that the use of "may" in s 20(2) of the MRA connotes conferral of a discretion on a local registration authority says nothing of itself about when and how that discretion is to be exercised and, in particular, says nothing of itself about "whether the discretion must be exercised in a particular way or upon a particular occasion"[68]. Any discretion takes its incidents from its context, and there is no novelty in the proposition that a discretion to take action to give effect to an entitlement can operate in substance as a duty compellable in an appropriate case by mandamus[69].

89 The discretion conferred on a local registration authority by s 20(2) of the MRA is in its terms limited to a discretion to grant and renew registration as if the law of the second State expressly provided that registration in the first State is a sufficient ground of entitlement to registration in the second State and to grant registration on that ground to a person who, having lodged a notice under s 19, has an entitlement to registration on that ground under s 20(1). The incidents of the discretion to grant registration are confined, both as to the timing of its exercise and as to the considerations that might properly be brought to bear on its exercise, by the operation of ss 21, 22 and 23. The combined effect of those provisions is as follows. The discretion must be exercised to grant registration within the period, set by s 21, of one month from the date of lodgment of the notice or such further period of up to six months as might be set, under s 22, by the local registration authority in a decision to postpone registration. And the discretion must be so exercised to grant registration unless the local registration authority decides, at or before the end of the applicable period, to refuse to grant

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65 Section 2(2) of the *Acts Interpretation Act 1901* (Cth).

66 Sections 2(1) and 3 of the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth), read with Sch 1.

67 Section 33(2A) of the *Acts Interpretation Act 1901* (Cth).

68 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 64; [1994] HCA 61.

69 eg, *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 64-66, 81, 87-88, 97-99.

registration, which the local registration authority is specifically empowered to do in the exercise of the discretion separately conferred on it by s 23 in the limited circumstances specified in that section.

90 The express conferral by s 23 of the MRA of a discretion on the local registration authority to refuse registration in the limited circumstances specified in that section is sufficient to invoke the ordinary principle of construction by which a specific power to do a thing subject to restrictions as to its exercise is read as operating to the exclusion of a general power in the same legislation which might otherwise have been read as authorising the doing of the same thing without needing to observe the same restrictions[70]. The principle leaves no room for a residual discretion to refuse registration under s 20(2) outside the circumstances specified in s 23.

91 To construe s 23 so as to leave no room for the discretion conferred by s 20(2) to be exercised to permit refusal of registration outside the circumstances specified in s 23 fits comfortably with the language of entitlement in s 20(1) and in s 17(1) of the MRA. More importantly, it is to arrive at the construction of s 20(2) that, of the contextually available alternatives, best achieves the MRA's stated purpose of promoting the goal of freedom of movement of service providers in a national market in Australia and that again does so in a manner consistent with the premise that regulatory standards applied for registration in one State are to suffice for registration in another State without supplementation or second-guessing by the local registration authority of that other State.

Prior cases

92 Reference was made in argument to three decisions of State Supreme Courts, each of which concerned the position of a person who, having been admitted to practice as a legal practitioner in another State and having given notice or purported notice under s 19 of the MRA, had been denied or granted registration under s 20(2) as a legal practitioner in a State: *Re Petroulias*[71], *Re Tkacz; Ex parte Tkacz*[72] and *Scott v Law Society of Tasmania*[73]. Reference was also made to a decision of the Court of Appeal of the Supreme Court of New

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70 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; [2006] HCA 50.

71 [2005] 1 Qd R 643.

72 (2006) 206 FLR 171.

73 [2009] TASSC 12.

South Wales which concerned the position of a person who, having been admitted to practice as a legal practitioner in New Zealand and having given equivalent notice, had been granted registration under the equivalent provision of the TMRA: *Prothonotary v Comeskey*[74].

93 Only one of those decisions, *Re Tkacz*, has the potential to bear materially on the issues in the appeal. Exactly what *Re Tkacz* decided is not entirely clear.

94 To the extent that *Re Tkacz* might be understood to have decided either that s 17(2) of the MRA renders a State law requiring that a legal practitioner be of good character applicable to registration under s 20(2) of the MRA or that the discretion conferred on a local registration authority by s 20(2) of the MRA extends to allowing a local registration authority to refuse registration of a person who has been admitted to practice as a legal practitioner in another State and who has given notice under s 19 of the MRA on the basis of its own assessment that the person is not of good character[75], it will be apparent from what I have written that I consider that case to have been wrongly decided.

95 To the extent that *Re Tkacz* held that a State Supreme Court is a local registration authority for the purpose of the MRA and to the extent that it might be taken to have held that the inherent jurisdiction of a State Supreme Court is unaffected by the MRA[76], I would reserve my consideration of its correctness for a case in which the correctness of each of those holdings squarely arose and was fully argued. Examination of the correctness of the first of those holdings would require consideration of whether a State Supreme Court fits the description of a "person"[77] or "authority"[78] within the MRA's definition of a local registration authority and of the weight to be attached in answering that question to the general provision that is made in the MRA for review of a decision of a local registration authority by the Administrative Appeals Tribunal. Examination of the correctness of the second of the holdings would require consideration of the potential for operation in a proceeding in the inherent jurisdiction of a State Supreme Court of the prescription in s 44(1) of the MRA that the mutual

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74 [2018] NSWCA 18.

75 (2006) 206 FLR 171 at 186-187 [62]-[67]. See also *Scott v Law Society of Tasmania* [2009] TASSC 12 at [42].

76 (2006) 206 FLR 171 at 178 [24], 180 [35], 182-183 [45], 188 [69].

77 cf *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6; [1952] HCA 32.

78 cf *Federal Commissioner of Taxation v Silverton Tramway Co Ltd* (1953) 88 CLR 559 at 565-566; [1953] HCA 79.

recognition principle and the provisions of the MRA "may be taken into consideration in proceedings of any kind" and of the import of that prescription.

Orders

96 The appeal must be dismissed with costs.

97 NETTLE AND GORDON JJ. The respondent, Mr Andriotis, was registered in New South Wales as a waterproofer. He said in his application to the New South Wales local registration authority that he had certain work experience. That was not true. Mr Andriotis then sought registration in Victoria, pursuant to the *Mutual Recognition Act 1992* (Cth), as a building practitioner under the *Building Act 1993* (Vic), the Victorian scheme regulating registration. The *Mutual Recognition Act* provides for recognition within each State and Territory of regulatory standards adopted elsewhere in Australia regarding goods and occupations and, thus, for recognition of registration for an occupation in one State by other States. The Victorian Building Practitioners Board refused Mr Andriotis' application because his New South Wales application demonstrated dishonesty and he was therefore not of "good character", as required by the *Building Act*[79].

98 The issue in this appeal was whether the *Mutual Recognition Act* permitted the Victorian Building Practitioners Board[80] to consider whether Mr Andriotis was of "good character" within the meaning of the *Building Act* when considering his application for registration in Victoria. These reasons will show that it was not open to the Board to determine whether Mr Andriotis was of good character as required by the *Building Act*. Mr Andriotis was entitled to registration in Victoria because, having lodged a written notice with that Board under the *Mutual Recognition Act*, the fact of his registration in New South Wales was itself a sufficient ground of entitlement to registration for the equivalent occupation in Victoria. Whether Mr Andriotis attained or possessed the necessary qualifications or experience relating to fitness to carry on an occupation was to be determined solely by New South Wales. To explain that conclusion it is necessary to consider the statute in some detail. It is convenient first, however, to summarise the procedural history.

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79 See *Building Act* compiled 1 July 2015, s 170(1)(c).

80 From 1 September 2016, the Building Practitioners Board was abolished and the registration functions previously conferred on the Board were vested in the Victorian Building Authority ("the VBA"): *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic), Div 2 of Pt 3; *Victoria Government Gazette*, S261, 23 August 2016. All decisions and actions of the Building Practitioners Board are taken to be decisions and actions of the VBA: *Building Act* compiled 1 September 2016, Sch 8, cll 3(1) and 6; see also s 3(1) definition of "Authority".

Procedural history

99 In March 2015, Mr Andriotis was issued with an "Endorsed Contract Licence – Waterproofing" by the New South Wales Fair Trading – Home Building Service.

100 On 3 June 2015, Mr Andriotis lodged an application with the Board seeking registration in Victoria as a "Domestic Builder Class W – Waterproofing". That application for registration was made under the *Mutual Recognition Act*.

101 On 28 October 2015, the Registrar of the Board wrote to Mr Andriotis seeking further information. The Registrar noted that Mr Andriotis had stated in his New South Wales application that he had worked as a waterproofer from February 2012 to March 2015 for Oxford Builders Pty Ltd but the Registrar was unable to verify his work with that company. The Registrar also requested three written references from professional referees in order for the Board to be satisfied Mr Andriotis was of good character.

102 On 11 November 2015, Mr Andriotis provided the requested information. Mr Andriotis stated that in addition to work with Oxford Builders Pty Ltd, he had worked for Delray Constructions. Mr Andriotis provided references from a director of Oxford Builders Pty Ltd and from Delray Constructions. On 30 November 2015, the Board refused Mr Andriotis' registration on the ground that he failed to satisfy the Board that he was of good character as required by s 170(1)(c) of the *Building Act*.

103 Mr Andriotis applied to the Administrative Appeals Tribunal for review of the Board's decision. On review, the Tribunal affirmed the Board's decision and concluded that Mr Andriotis was not of good character as required by s 170(1)(c) of the *Building Act*[81]. The Tribunal found that "the evidence supporting Mr Andriotis' application for registration under the Mutual Recognition Act was materially defective and misleading"[82] and that he "had not dealt forthrightly, honestly and with candour with registration and regulatory authorities"[83].

104 Mr Andriotis appealed to the Federal Court of Australia. The Full Court of the Federal Court determined that the Tribunal erred in concluding that it was entitled to take into account and apply the good character requirement in

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81 *Andriotis and Building Practitioners Board* [2017] AATA 378 at [135], [137].

82 *Andriotis* [2017] AATA 378 at [140].

83 *Andriotis* [2017] AATA 378 at [142].

s 170(1)(c) of the *Building Act* and, on that basis, set aside the decision of the Tribunal and remitted the matter to the Tribunal to be heard and decided again according to law.

The *Mutual Recognition Act*

105 The principal purpose of the *Mutual Recognition Act* is to promote the "goal of freedom of movement of goods and service providers in a national market in Australia"[84]. The scheme is not unique[85].

106 In a State or Territory[86], there are two paths to registering for an occupation: either a person can apply under the prevailing State regulatory scheme (here, the *Building Act*), or, if they are registered for an equivalent occupation in another State, they can apply for recognition of that registration under the *Mutual Recognition Act*. These are therefore two parallel means of achieving the same end. The *Mutual Recognition Act* does not limit the operation of a law of a State so far as it can operate concurrently with that Act[87]. The *Mutual Recognition Act* leaves room for State laws to continue to operate with respect to registration of occupations.

107 Section 20 in Pt 3 of the *Mutual Recognition Act*, headed "Entitlement to registration and continued registration", provides:

> "(1) A person who lodges a *notice* under section 19 with a local registration authority of the second State is entitled to be registered in the equivalent occupation, as if the law of the second State that deals with registration *expressly provided that registration in the first State is a sufficient ground of entitlement to registration*.
>
> (2) The local registration authority may grant registration on that ground and may grant renewals of such registration.

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84 *Mutual Recognition Act*, s 3.

85 See *Trans-Tasman Mutual Recognition Act 1997* (Cth).

86 In accordance with the definition of "State" in s 4(1) of the *Mutual Recognition Act*, the word "State" used in this judgment shall include, where relevant, the Australian Capital Territory or the Northern Territory.

87 *Mutual Recognition Act*, s 6(2).

(3) Once a person is registered on that ground, the entitlement to registration continues, whether or not registration (including any renewal of registration) ceases in the first State.

(4) Continuance of registration is otherwise subject to the laws of the second State, to the extent to which those laws:

(a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and

(b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

(5) The local registration authority may impose conditions on registration, but may not impose conditions that are more onerous than would be imposed in similar circumstances (having regard to relevant qualifications and experience) if it were registration effected apart from this Part, unless they are conditions that apply to the person's registration in the first State or that are necessary to achieve equivalence of occupations.

(6) This section has effect subject to this Part." (emphasis added)

108 Section 20(1) expressly provides that the fact of registration in the first State is itself a sufficient ground of entitlement to registration, subject to the requirements in s 19. Section 20(2) provides that the local registration authority of the second State *may* grant registration on that ground. But the use of the word "may" in this context should not mislead[88].

109 Under s 21 of the *Mutual Recognition Act*, a local registration authority has only three options: to grant, postpone or refuse the registration. If it does not postpone or refuse, it "must" grant the registration within one month[89]. The three options before the local registration authority are shaped by the entitlement to registration in s 20(1), subject to the requirements in s 19. In other words, if the statutory conditions are met, the local registration authority of the second State must grant the registration.

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88 See *Smith v Watson* (1906) 4 CLR 802 at 811-812; [1906] HCA 80; *Ward v Williams* (1955) 92 CLR 496 at 505-508; [1955] HCA 4; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135, 138-139; [1971] HCA 12, citing *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214.

89 *Mutual Recognition Act*, s 21(1), (3), (4).

110 The question then is whether the second State can refuse registration under s 20(2) of the *Mutual Recognition Act* on the basis that the applicant is not of good character within the meaning of the local regulatory scheme. The answer is no.

111 Section 20 must be read subject to Pt 3[90].

112 The "mutual recognition principle", as applying to occupations, is set out in Pt 3[91]. Section 17(1) in Div 1 of Pt 3 defines the mutual recognition principle as follows:

> "The mutual recognition principle is that, subject to this Part, a person who is registered in the first State for an occupation is, by this Act, *entitled* after notifying the local registration authority of the second State for the equivalent occupation:
>
> (a) to be registered in the second State for the equivalent occupation; and
>
> (b) pending such registration, to carry on the equivalent occupation in the second State." (emphasis added)

113 A person registered for an occupation in the first State is entitled, after notifying the local registration authority of the second State, to be registered in the second State for an equivalent occupation. The entitlement to registration in the second State arises "after notifying"[92] the second State authority. It does not require "applying to" that authority, only "notifying" it.

114 That view is reinforced by Div 2 of Pt 3, headed "Entitlement to registration", which provides for the practical application of the mutual recognition principle in Div 1. Section 19(1) provides that a "person who is registered in the first State for an occupation may *lodge a written notice* with the local registration authority of the second State for the equivalent occupation, seeking registration for the equivalent occupation in accordance with the mutual recognition principle" (emphasis added).

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90 *Mutual Recognition Act*, s 20(6).

91 *Mutual Recognition Act*, s 16(1).

92 *Mutual Recognition Act*, s 17(1).

115 The entitlement to registration is "subject to [Pt 3]"[93]. That is, the entitlement to registration does not arise unless the applicant is registered for an "occupation" in another State[94]; the entitlement to registration only applies to "equivalent" occupations, being those where the authorised activities are "substantially the same"[95]; and the entitlement to registration does not arise unless the applicant lodges a notice under s 19[96].

116 The notice must, relevantly, contain prescribed information, enclose documents or information evidencing the existing registration, and be verified by a statutory declaration[97]. Relevantly, under s 19(2) the notice must:

> "(d) state that the person is not the subject of disciplinary proceedings in any State (including any preliminary investigations or action that might lead to disciplinary proceedings) in relation to those occupations; and
>
> ...
>
> (h) give consent to the making of inquiries of, and the exchange of information with, the authorities of any State regarding the person's activities in the relevant occupation or occupations or otherwise regarding matters relevant to the notice."

117 If the applicant cannot truthfully make the statements required by s 19(2) or provide a true instrument or sufficient information evidencing their registration in the first State[98], they will be unable to lodge the s 19 notice in the form required, and no entitlement to registration in the second State will arise.

118 Consistent with the primacy of registration in the first State being a sufficient ground of entitlement to registration in the second State, registration must be granted by the local registration authority in the second State

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93 *Mutual Recognition Act*, ss 17(1) and 20(6).

94 *Mutual Recognition Act*, s 19(1) read with s 4(1) definition of "occupation".

95 *Mutual Recognition Act*, s 19(1) read with s 29(1).

96 *Mutual Recognition Act*, ss 19(1) and 20(1).

97 *Mutual Recognition Act*, s 19(2)-(5).

98 *Mutual Recognition Act*, s 19(3)-(5).

within one month after lodgement of the s 19 notice[99]. However, that requirement is subject to Pt 3, and the fact that within one month of lodgement, the authority may postpone or refuse the grant of registration[100]. If the authority takes no action within that time, the person is immediately entitled to registration and "no objection may be taken to the notice on any of the grounds on which refusal or postponement may be effected, except where fraud is involved"[101].

119 The mutual recognition principle in s 17 expressly provides that it does not affect the operation of laws that *regulate the manner of carrying on an occupation* in the second State, subject to two exceptions in s 17(2) which are in the following terms:

> "However, the mutual recognition principle is *subject to the exception* that it does *not affect the operation of laws that regulate the manner of carrying on an occupation* in the second State, so long as those laws:
>
> (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and
>
> (b) *are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation*." (emphasis added)

120 This appeal is concerned with the exception in s 17(2)(b) − while s 17(2) provides that the mutual recognition principle does not affect laws of the second State that *regulate the manner of carrying on an occupation*, this only applies to laws that are *not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation*. Section 17(2)(b) means, at least, that the second State cannot impose higher qualifications for registration than the first State. The question is whether the exception provided by s 17(2)(b) means that the second State cannot consider whether the applicant is of good character either because the applicant misstated what qualifications the applicant had when seeking registration in the first State, or for some other reason. Or, put in different terms, is a law requiring a person to be of good

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99 *Mutual Recognition Act*, s 21(1).

100 *Mutual Recognition Act*, s 21(1) and (3).

101 *Mutual Recognition Act*, s 21(4).

character a law about *the attainment or possession of some qualification or experience relating to fitness to carry on the occupation*[102]?

121 The answer is found in the mutual recognition principle, reflected in Pt 3 of the *Mutual Recognition Act* read as a whole. The fact of registration in the first State is a sufficient ground of registration in the second State in respect of all aspects of qualification and experience, *including any character requirements*, relating to fitness to carry on an occupation. Thus, it is not open to the second State to go behind registration in the first State and seek to challenge or review any aspect of the applicant's qualifications and experience, including any character requirements, relating to their fitness to carry on the occupation in the first State. As was stated during the Second Reading Speech in the House of Representatives in relation to the *Mutual Recognition Bill 1992*, "[i]f someone is assessed to be good enough to practise a profession or occupation in one State or Territory, then they should be able to do so anywhere in Australia"[103].

122 There are several other elements of the statutory context that support that construction.

123 Part 3 deals with the ability of a person who is registered in connection with an occupation in a State (the first State) to carry on an equivalent occupation in another State (the second State). "Occupation" is relevantly defined to mean "an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper)"[104]. As is apparent, when defining what is an "occupation" under the *Mutual Recognition Act*, a qualification includes character and being a fit or proper person. As the Minister said during the Second Reading Speech, "[l]ocal registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practise"[105].

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102 It is not disputed that s 170(1)(c) of the *Building Act* is a law "that regulate[s] the manner of carrying on an occupation in the second State" within the meaning of s 17(2) of the *Mutual Recognition Act*.

103 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2433.

104 *Mutual Recognition Act*, s 4(1) definition of "occupation".

105 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2433.

124 Next, postponement of registration is addressed in s 22. It provides that a local registration authority *may* postpone the grant of registration for no longer than a period of six months if[106]:

> "(a) any of the statements or information in the notice as required by section 19 are materially false or misleading; or
>
> (b) any document or information as required by subsection 19(3) has not been provided or is materially false or misleading; or
>
> (c) the circumstances of the person lodging the notice have materially changed since the date of the notice or the date it was lodged; or
>
> (d) the authority decides that the occupation in which registration is sought is not an equivalent occupation."

125 That power to postpone the grant of registration for up to six months is important. It permits the local registration authority in the second State to make inquiries. Indeed, by lodging a notice under s 19, an applicant gives consent to that local registration authority "making ... inquiries of, and [exchanging] information with, the authorities of any State regarding the person's activities in the relevant occupation or occupations or otherwise regarding matters relevant to the notice"[107].

126 Moreover, the power of postponement under s 22 is not only of assistance to the second State. It also provides the first State with time to take any necessary disciplinary action under the laws of the first State. Those actions could, for example, include suspending or revoking the applicant's registration in that State, thereby removing the basis of the applicant's entitlement to registration in the second State under the *Mutual Recognition Act*. That is, the *Mutual Recognition Act* presumes that each relevant State registration authority will, consistent with the applicable local statute, take action to ensure that those registered in that State comply with the basis upon which they were registered in that State; and investigate, if required, whether they should remain registered.

127 Refusal of registration by the second State is addressed in s 23. That section provides that a local registration authority may refuse the grant of registration if[108]:

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106 *Mutual Recognition Act*, s 22(1) and (3).

107 *Mutual Recognition Act*, s 19(2)(h).

108 *Mutual Recognition Act*, s 23(1).

"(a) any of the statements or information in the notice as required by section 19 are materially false or misleading; or

(b) any document or information as required by subsection 19(3) has not been provided or is materially false or misleading; or

(c) the authority decides that the occupation in which registration is sought is not an equivalent occupation and equivalence cannot be achieved by the imposition of conditions."

128 None of those grounds is engaged in the present appeal. But expressly providing that the local registration authority in the second State may refuse registration if the applicant makes false statements to *that authority* tends to suggest that the local registration authority is not to be concerned with examining whether registration in the first State was obtained by false statements. Indeed, the three grounds for refusal reflect the requirements in s 19 of the *Mutual Recognition Act*. Section 23(1) gives the local registration authority power to refuse registration where the s 19 requirements have not been met. Section 23(1) is exhaustive.

129 Moreover, pending the grant or refusal of registration, a person who lodges a notice under s 19 is "taken to be registered as provided in section 20"[109]. Subject to certain limitations, a person who has such "deemed registration" may carry on the occupation in the second State as if the deemed registration were "substantive registration" in the second State[110]. Those limitations include a requirement that to carry on the occupation under deemed registration, the person must comply with requirements regarding insurance, fidelity funds, trust accounts and the like that are designed to protect the public, clients, customers or others[111]. Once the authority in the second State is satisfied that the person is indeed registered in the first State for an equivalent occupation, it must grant the registration and the interim arrangements under Div 3 of Pt 3 of the *Mutual Recognition Act* cease to apply. In this way, both the grounds for refusal and the intervening deemed registration reflect the primacy of the registration in the first State as the ground for registration in the second State.

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109 *Mutual Recognition Act*, s 25(1); see also s 26.

110 *Mutual Recognition Act*, s 27(1).

111 *Mutual Recognition Act*, s 27(3)(a).

130 Continuance of registration is addressed in s 20(4). It provides that:

> "Continuance of registration is otherwise[112] subject to the laws of the second State, to the extent to which those laws:
>
> (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and
>
> (b) *are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation*." (emphasis added)

131 Continuation of registration is subject to the laws of the second State but subject to the same exceptions to the mutual recognition principle in s 17(2). The exceptions are in the same terms. A strong reason would be needed to read the two provisions differently and no reason, let alone a strong reason, has been identified. Thus, on its face, s 20(4)(b), like s 17(2)(b), reflects the primacy of the laws of the first State in relation to the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

132 That analysis of the statutory scheme provides a complete answer to the submission of the Victorian Building Authority ("the VBA") that because it, or its predecessor, "may" grant registration under s 20(2) of the *Mutual Recognition Act*, the Board had a discretionary power to refuse registration based on Mr Andriotis not being of good character. As has been observed, there is no such discretion.

133 Three further provisions of the *Mutual Recognition Act* were relied upon by the VBA as support for its contention that the local registration authority in the second State may refuse registration on the basis of factors outside the s 19 requirements. First, the VBA contended that s 19(2)(h) demonstrated that the inquiries of the local registration authority are not limited to the matters the subject of the s 19 notice and, by extension, permitted the VBA to refuse registration on the basis of other matters. That contention should be rejected. The consent, and the scope of the activities permitted to be investigated by the local registration authority, are identified by the concluding words in s 19(2)(h), namely "regarding the person's activities in the relevant occupation or occupations *or otherwise regarding matters relevant to the notice*" (emphasis added). These words limit the scope of the matters to be investigated by the local registration authority.

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112 Referring to *Mutual Recognition Act*, s 20(3).

134 Next, the VBA contended that the reference to fraud in s 21(4) meant that the power to refuse registration on the basis of fraud must be found elsewhere than in s 23(1). That contention proceeds on an incorrect premise. A notice lodged under s 19 that has been procured by fraud is not a "notice under section 19" within the meaning of s 20(1)[113]. Thus, an applicant who lodges a notice procured by fraud does not cross the s 19 threshold.

135 Finally, it is necessary to refer to s 36, which provides that "[r]esidence or domicile in a particular State is not to be a prerequisite for or a factor in entitlement to the grant ... of registration arising under this Part". The VBA contended that s 36 is a qualification on the entitlement to registration that is outside the scope of s 19. Section 36 is not an additional qualification. It simply confirms that the requirement for the applicant to be "registered in the first State" under s 19(1) does not mean that the applicant must be resident or domiciled in that State. As explained, s 23(1) provides an exhaustive statement of the grounds for refusal of registration.

136 For these reasons, the local registration authority in the second State is not permitted to go behind the person's registration in the first State. Section 170 of the *Building Act* has no application to those seeking registration under the *Mutual Recognition Act* and only applies to those seeking registration under the parallel local scheme. No inconsistency between s 170 of the *Building Act* and the *Mutual Recognition Act* arises.

137 At first blush, it may seem odd that the laws of the first State in relation to the attainment or possession of some qualification or experience relating to fitness to carry on the occupation are given primacy over the laws of the second State. Putting the same point as a question − does reading the *Mutual Recognition Act* in a way that obliges the second State to register an applicant who is registered in the first State distort the operation of the Act? In particular, does it mean that giving that operation or meaning to ss 17(2)(b) and 20(4)(b) leads to some unintended or absurd result in regulating the continuing conduct of persons registered under the *Mutual Recognition Act*? The answer is no.

138 To show why reading the *Mutual Recognition Act* as requiring registration of Mr Andriotis in Victoria does not lead to an unintended or absurd result, even though he had misstated his experience when seeking registration in New South Wales, it is necessary to say something briefly about the disciplinary provisions under the relevant Victorian legislation − the *Building Act*.

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113 See *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 196-199 [15]-[22], 200-201 [29], 206 [51]-[52]; [2007] HCA 35.

Those provisions[114] would apply if, after registration, Mr Andriotis engaged in conduct contrary to the standards established by that Act. More particularly, s 20(4)(b) of the *Mutual Recognition Act* would not preclude the engagement of the disciplinary provisions in relation to Mr Andriotis' conduct or events occurring after he was registered in Victoria.

139 Indeed, in Div 5 of Pt 3 of the *Mutual Recognition Act*, which deals in part with disciplinary action, s 33(1) provides that if a person's registration in an occupation in "a State" is cancelled, suspended or subject to a condition "on disciplinary grounds, or as a result of or in anticipation of criminal, civil or disciplinary proceedings, then the person's registration in the equivalent occupation in another State is affected in the same way". Further, s 37(2)(c) requires the first State authority to furnish relevant information to the second State authority if the information is required by the second State in connection with "actual or possible disciplinary action" against the registrant. The construction of the *Mutual Recognition Act* adopted here would not distort the operation of those provisions or bring about absurd outcomes.

140 Thus, where registration in one State is obtained on the basis that the relevant person has attained or possessed some qualification or experience relating to fitness to carry on the occupation under the laws of that State, it is not open to the second State to go behind that registration. If a person seeks registration in a second State under the *Mutual Recognition Act* then, prior to registration as well as after registration in the second State under the *Mutual Recognition Act*, it is for the first State to address the applicant's attainment or possession of some qualification or experience relating to fitness to carry on the occupation under the laws of the first State. The exact ambit of what constitutes the "attainment or possession of some qualification or experience relating to fitness to carry on the occupation" in ss 17(2)(b) and 20(4)(b) may require further consideration in later cases.

141 So long as the person remains registered in the first State, their registration, and the continuation of their registration, in the second State is governed by the mutual recognition scheme. However, the application of ss 17(2)(b) and 20(4)(b) to the laws of the second State that apply to a person registered under the *Mutual Recognition Act* does not mean that the local regulatory authority in the second State cannot, and should not, prosecute a person for contravening laws of the second State that *do not* fall within the ambit of laws based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

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114 See *Building Act* compiled 26 September 2018, ss 178 and 179.

142 The *Building Act* in Victoria in its application to Mr Andriotis is illustrative.

The *Building Act*

143 The *Building Act* regulates building practitioners in Victoria[115]. The local registration authority at the relevant time was the Building Practitioners Board (now the VBA[116]). Part 11 concerned registration. Section 170, headed "Registration", provided[117]:

> "(1) The Building Practitioners Board must register an applicant in each category or class applied for if it is satisfied that the applicant −
>
> (a) has complied with section 169; and
>
> (b) either −
>
> (i) holds an appropriate prescribed qualification; or
>
> (ii) holds a qualification that the Board considers is, either alone or together with any further certificate, authority, experience or examination equivalent to a prescribed qualification; and
>
> (c) *is of good character*; and
>
> (d) has complied with any other condition prescribed for registration in that category or class.
>
> (2) The Building Practitioners Board may refuse to register an applicant if the requirements of subsection (1) are not met.
>
> (5) In this section ***qualification*** means any degree, diploma, certificate, accreditation, authority, training, experience or examination

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115 *Building Act* compiled 1 July 2015, s 1(d); see also s 3(1) definition of "building practitioner", which includes the term "domestic builder".

116 See fn 80 above.

117 *Building Act* compiled 1 July 2015. After 1 September 2016, the "good character" test in s 170(1)(c) was replaced with a "fit and proper person" test: *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic), s 20(2). This change is not an issue in dispute.

(whether obtained inside or outside Victoria)." (first emphasis added)

144 As explained earlier, it was not open to the Board or the Tribunal to have regard to s 170(1)(c) in addressing Mr Andriotis' entitlement to registration or his continued registration in Victoria.

145 But that did not preclude the possible operation of s 179 of the *Building Act*, which, at the time of the Board's decision, permitted it to take disciplinary action, such as by cancelling, suspending or imposing conditions on registration[118], if the Board was to find, for example, that Mr Andriotis was "guilty of unprofessional conduct"[119] by reason of his conduct after registration.

146 In its current form, s 179 of the *Building Act* provides that disciplinary action can be taken if, among other things, "the practitioner has engaged in unprofessional conduct or has failed to comply with a code of conduct"[120] or where "the practitioner has engaged in conduct in relation to the practitioner's practice as a building practitioner that is − (i) constituted by a pattern of incompetence; or (ii) negligent in a particular matter"[121]. In addition, under Subdiv 3 of Div 3 of Pt 11 of the *Building Act*, after registration, grounds for immediate suspension of the registration of a registered building practitioner include insolvency[122], where the practitioner has been convicted of an indictable offence involving fraud, dishonesty, drug trafficking or violence[123], where the practitioner has ceased to be covered by the required insurance[124] and where the practitioner has failed to comply with a condition of the practitioner's registration[125].

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118 See *Building Act* compiled 1 July 2015, s 179(2)(da), (e), (f).

119 *Building Act* compiled 1 July 2015, s 179(1)(a).

120 *Building Act* compiled 26 September 2018, s 179(1)(b).

121 *Building Act* compiled 26 September 2018, s 179(1)(f).

122 *Building Act* compiled 26 September 2018, s 180(a).

123 *Building Act* compiled 26 September 2018, s 180(c).

124 *Building Act* compiled 26 September 2018, s 180(d).

125 *Building Act* compiled 26 September 2018, s 180(g).

147 These provisions are capable of operating, and are intended to operate, concurrently with the *Mutual Recognition Act*[126].

Previous authorities

148 Contrary to the VBA's submissions, the construction of the *Mutual Recognition Act* it contended for is not supported by earlier authorities which had considered aspects of the *Mutual Recognition Act* in its application to legal practitioners.

149 In *Re Petroulias*, the applicant applied for registration as a solicitor in Queensland under the *Mutual Recognition Act*[127]. Mr Petroulias was unable to make the declarations required by s 19(2) of the *Mutual Recognition Act* truthfully with the result that his s 19 "notice was consequently not apt to crystallise the entitlement to registration in Queensland", the second State, provided by s 20 of the *Mutual Recognition Act*[128]. The Queensland Court of Appeal held that Mr Petroulias' registration in Queensland, based on his registration in another State as a sufficient ground of entitlement to registration in Queensland, should be set aside[129]. Mr Petroulias did not cross the s 19 threshold.

150 *Re Tkacz; Ex parte Tkacz*[130] concerned a legal practitioner who, having fully disclosed a criminal conviction, was admitted to practice in New South Wales. Mr Tkacz applied to be admitted in Western Australia[131]. The question for the Full Court of the Supreme Court of Western Australia was whether the *Mutual Recognition Act*, whether by express words or necessary implication, removed or curtailed the residual power of the Supreme Court in its inherent jurisdiction to refuse to admit an applicant who has otherwise satisfied the admission requirements[132]. The Full Court held that the *Mutual Recognition Act* did not displace the Court's inherent power to regulate admission to practice in

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126 See *Mutual Recognition Act*, s 6(2).

127 [2005] 1 Qd R 643 at 648 [1].

128 *Re Petroulias* [2005] 1 Qd R 643 at 651 [19].

129 *Re Petroulias* [2005] 1 Qd R 643 at 654 [38], 656 [53].

130 (2006) 206 FLR 171.

131 *Re Tkacz* (2006) 206 FLR 171 at 174-175 [4]-[6].

132 *Re Tkacz* (2006) 206 FLR 171 at 186 [61].

that State[133]. For present purposes, it is unnecessary to determine whether that is so. Here, the VBA has no similar inherent jurisdiction which might operate independently of the *Mutual Recognition Act*.

151 In *Scott v Law Society of Tasmania*[134], which involved relevantly similar facts to *Re Petroulias*, the applicant failed to disclose in her notice under s 19 of the *Mutual Recognition Act* that she had been the subject of a complaint in the Northern Territory in which the council of the Law Society of the Northern Territory had made a finding of unprofessional conduct, and resolved that the applicant be admonished under the *Legal Practitioners Act* (NT)[135]. Crawford CJ (with whom Slicer and Evans JJ agreed) correctly stated that "because the *Mutual Recognition Act*, s 20(1), establishes entitlement to admission under the Act as if the law of the second State expressly provides that admission in the first State is sufficient ground of entitlement to admission, provided that the applicant is a person who has lodged a notice seeking admission under s 19 ... [o]n its face, s 20(1) leaves little room for a discretion based on the applicant's character or prior conduct"[136]. The question of what significance should be attributed to his Honour's subsequent statement that there is, however, authority for the proposition that there is a remaining discretion by reference to *Re Petroulias* and *Re Tkacz* is something which, for present purposes, need not be decided.

Conclusion and orders

152 For those reasons, the appeal should be dismissed with costs.

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133 *Re Tkacz* (2006) 206 FLR 171 at 188 [69].

134 [2009] TASSC 12.

135 [2009] TASSC 12 at [19]-[25], [30], [37]-[38].

136 *Scott* [2009] TASSC 12 at [42].

153 EDELMAN J. Mr Andriotis was registered as a waterproofer in one Australian State (New South Wales). He applied for registration as a waterproofer in a different State (Victoria). He relied upon the "mutual recognition principle" in the *Mutual Recognition Act 1992* (Cth) ("the MRA"). That principle, as it applies to occupations in Pt 3 of the MRA, is concerned with an application by a registered member of an occupation in one State to be registered to carry on an equivalent[137] occupation in another State. The central issue in this appeal is whether the MRA permitted the Victorian Building Practitioners Board ("the Board") to consider whether Mr Andriotis was of "good character", within the meaning of s 170(1)(c) of the *Building Act 1993* (Vic), when assessing his application for registration.

154 I gratefully adopt the facts relevant to this appeal and the background to the MRA that are set out in the other judgments. For the reasons below, Mr Andriotis' interpretation of Pt 3 of the MRA should be accepted. The MRA did not permit the Board to consider whether Mr Andriotis was of good character. The appeal must be dismissed.

Mutual recognition principle

155 At the heart of this appeal is the "mutual recognition principle". The MRA uses the expression "mutual recognition principle" in the sense of a "justification for adopting and applying"[138] rules, or a guide or foundation for rules, but not itself intended for direct application. As a principle, mutual recognition is therefore a matter that applies to the facts and circumstances of a case indirectly by affecting the application of a rule rather than being, itself, a rule capable of direct application. A clear example of the mutual recognition principle being used in this sense of a principle can be seen in s 44(1) of the MRA, which provides that the mutual recognition principle is a matter that "may be taken into consideration in proceedings of any kind and for any purpose".

156 The mutual recognition principle is used in relation to both goods and occupations in Pts 2 and 3 of the MRA as a high-level statement or summary that guides the rules in those Parts. So, in relation to goods, the rules can be seen in provisions that include: s 8(2), which provides that Pt 2 deals with goods produced in or imported into a State ("the first State") and their sale in another State ("the second State"); s 10, which describes requirements of the law of the second State that do not need to be complied with for that sale; s 11, which describes those requirements that do need to be complied with; and ss 14 and 15, which set out various exemptions. In contrast, the mutual recognition principle in s 9 describes only the broad effect of Pt 2 of the MRA. That broad effect,

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137 MRA, s 29(1).

138 Dworkin, *Taking Rights Seriously* (1977) at 28.

which is expressly made subject to the particular provisions of Pt 2, is to permit the sale in a second State of goods produced or imported into a first State without complying with requirements of the law of the second State that are listed in s 10. The mutual recognition principle in relation to occupations in Pt 3 of the MRA is used in this same sense of a high-level statement not intended for direct application.

The instantiation of the mutual recognition principle in Pt 3 of the MRA

157 The mutual recognition principle in Pt 3 is stated in s 17. It is a principle of entitlement to be registered in the second State for the equivalent occupation (and, pending registration, to carry on the equivalent occupation in the second State) after notifying the local registration authority. The section thus describes the intention that there be a general entitlement to be registered upon notification, subject to the "exception" in s 17(2) to preserve particular laws that "regulate the manner of carrying on an occupation in the second State". Section 17(2) is an exception to the principle, not an additional principle. In other words, the principle is singular and is concerned with an entitlement to be registered rather than a principle concerning an entitlement to be registered and a separate principle concerning an entitlement to continue to carry on the occupation.

158 As a high-level statement, the mutual recognition principle does not explain when or how the local authority of the second State must be notified. It does not provide for the detail of the operation of "deemed registration", as described in s 25, pending a decision to grant or refuse registration by the local authority of the second State. It does not provide a time period in which the local authority must take action to register a person (s 21). It does not provide for circumstances in which the grant of registration might be postponed after notification (s 22). It does not provide for the circumstances in which registration might be refused or how the local authority might inform the person of its decision (ss 23 and 24). All these rules, and other relevant rules, of direct application are set out in the subsequent Divisions of Pt 3. The mutual recognition principle is neither intended for, nor capable of, direct application.

159 The narrow interpretation, for which the Victorian Building Authority ("the VBA") contended, is concerned with the rule in s 20(4)(b). The structure of s 20 is as follows. First, it provides for a general entitlement to registration in the second State after lodgement of a notice (s 20(1)). Secondly, it provides a duty for the local registration authority of the second State to grant that registration, and renewals of that registration (s 20(2)). Sub-section (2) is expressed in terms that the registration and renewals "may" be granted because they are subject to grounds for refusal in s 23. Thirdly, it provides for the registration in the second State to "continue" even if registration in the first State or a renewal of registration in the first State lapses (s 20(3)). Fourthly, it provides that "[c]ontinuance of registration", which must be a reference to the initial registration in the second State and any renewal of registration, is subject to the

laws of the second State, with exceptions including where the laws are "based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation" (s 20(4)). Fifthly, it permits the local registration authority of the second State to impose conditions on registration subject to certain requirements (s 20(5)).

Three interpretations of the requirements of Pt 3 of the MRA

160 There are at least three possible interpretations concerning the extent to which registration of the person in the first State, including any assessment of character or fitness to carry on an occupation, *must* be recognised and continued in the second State. Each of these interpretations is subject to exceptions that can be put to one side for present purposes[139]. The three interpretations can be contrasted to illustrate why the third interpretation best reflects the intention of the Commonwealth Parliament.

161 The first interpretation is at one extreme, maximising the autonomy of the second State. On the first interpretation, the mutual recognition principle would require the local authority of the second State to respect only the assessment by the local authority of the first State of a person's technical qualifications and experience. It would not require respect for the assessment by the first State's local authority of the person's character or fitness to carry on the occupation. This means, for example, that if after registration in the first State and whilst carrying on that occupation in the first State a person commits serious dishonesty offences without being deregistered in the first State, the local authority of the second State could refuse to register the person if the dishonesty offences meant that the person failed the second State's character requirements for registration.

162 A second interpretation is at the other extreme, with the greatest impairment of the autonomy of the second State, including significant impairment after the registration of the person in the second State. Although no party contended for this second interpretation, the language of the MRA leaves open this alternative interpretation. The second interpretation is that the mutual recognition principle would require the local authority of the second State *at all times* to respect the assessment by the local authority of the first State of both (i) the person's technical qualifications and experience, and (ii) the person's character or fitness or propriety to carry on the occupation for all purposes relating to carrying on the occupation. This means that a person convicted of a serious dishonesty offence whilst carrying on an occupation in the second State could not, after a disciplinary hearing, have her or his registration suspended or cancelled by the local authority of the second State on the basis of bad character or lack of fitness or propriety to carry on the occupation. Any assessment of

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139 See MRA, ss 21(3), 22, 23.

character or fitness or propriety to carry on the occupation would fall to the local authority of the first State, even if the person no longer practises the occupation in the first State.

163 The third interpretation is a media sententia lying between the two extreme interpretations. The third interpretation is that the mutual recognition principle requires the local authority of the second State to respect the assessment by the local authority of the first State of the person's technical qualifications, experience and character for the initial registration without generally affecting the ability of the second State's local authority subsequently to take disciplinary action against the person based on the person's present lack of good character or fitness or propriety to carry on the occupation. Therefore, using the example above, this means that the second State could take disciplinary action against a person convicted of a serious dishonesty offence whilst carrying on an occupation in that State, on the basis of lack of good character or fitness or propriety to carry on the occupation.

The first interpretation should not be adopted

164 The first interpretation is essentially the interpretation proposed by the VBA. In short, the VBA submitted that a narrow interpretation should be given to one of the preconditions for laws such as s 170(1)(c) of the *Building Act* to fall within the exception to the mutual recognition principle. The relevant precondition, stated in the expression of the principle in s 17(2)(b) and in the rule in s 20(4)(b), is that the laws of the second State regulating the manner of carrying on an occupation "are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation". The VBA submitted that that qualification was intended in its narrow sense to mean only academic qualifications[140] or some kind of qualification acquired after completion of an examination, and did not include matters such as "good character" within the meaning of s 170(1)(c) of the *Building Act*. The text, history, purpose, and context of the MRA combine to require the conclusion that this first interpretation is too narrow.

165 Textually, the first interpretation fails to give sufficient weight to the words "relating to fitness to carry on the occupation" in s 17(2)(b) and s 20(4)(b), which do not naturally connote only formal qualifications. Contextually, the first interpretation is inconsistent with the broad meaning given to "qualification" in the definition of "occupation" in s 4(1) as "the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper)". Further, with respect to context and history,

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140 Relying upon *Re Director-General of Health (Cth); Ex parte Thomson* (1976) 51 ALJR 180 at 181-182; 11 ALR 471 at 475.

the first interpretation is inconsistent with the statement made by the Minister in the Second Reading Speech of the Bill that became the MRA that "[l]ocal registration authorities will be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practise"[141]. Finally, the purpose expressed in s 3 of the MRA, "of promoting the goal of freedom of movement of goods and service providers in a national market in Australia", supports a constraint upon the laws of the second State confined not merely to respecting the first State's assessment of formal qualifications but also to respecting the first State's assessment of a person's character and fitness or propriety to practise. However, relevantly to the second interpretation, this purpose does not require respect for the first State in relation to issues concerning discipline for matters affecting the person's fitness to practise in the second State occurring *after* registration has been granted.

The third interpretation should be preferred to the second

166 The third interpretation is relied upon by Mr Andriotis. As between the second and third interpretations, the third interpretation gives best effect to the intention of the Commonwealth Parliament for the following three reasons.

(1) The context of the high-level mutual recognition principle

167 As explained, the entitlement to registration in s 20 does not incorporate the high-level statement of the mutual recognition principle in s 17 as a rule in s 20. The high-level statement only provides a guide to the interpretation of s 20. However, the importance of that guide is that it illustrates that s 20 is concerned with, and provides a rule of direct application for, an entitlement to registration and renewals of registration. In light of the s 17 principle, as a single principle concerned with registration, and not two principles concerned with (i) rights of registration, and (ii) rights of carrying on an occupation, s 20 should not be interpreted as though s 20(1) provided, in addition to an entitlement to registration (including renewals of registration), an entitlement to remain registered or to continue to be registered despite any disciplinary concerns by the second State.

168 Section 20 reflects this instantiation of the mutual recognition principle. Section 20(1) is the core rule that gives effect to the mutual recognition principle. The following sub-sections are concerned with the mechanics of that entitlement to registration. In the context of s 20(1)-(3), the restriction in s 20(4)(b) is concerned with the initial registration and any renewals of registration. By applying also to renewals of registration ("continuing" registration),

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141 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2433.

s 20(4)(b) ensures that the second State cannot pay lip-service to the mutual recognition principle by granting an initial registration despite concerns about the person's character or fitness or propriety to practise and then refusing renewal for the same concerns. By contrast, any suspension or cancellation of registration as a result of a disciplinary hearing in the second State is not a grant or a renewal of the registration. It is a separate procedure concerned with the standards of the present delivery of the service.

(2) The separate preservation of disciplinary action

169 Subject to one constraint discussed below, s 33 of the MRA, entitled "Disciplinary action", is a rule that reinforces the boundaries of the mutual recognition principle. Section 33(1) has the effect that the cancellation or suspension of registration, or the imposition of conditions on registration, by the local authority of *either* the first or the second State will affect the person's registration in the other State in the same manner. Sub-section (2) provides for the possibility of different results for registration in different States following a disciplinary hearing in one State. The local authority of the State in which disciplinary action is not taken has the power to reinstate a cancelled or suspended registration or waive a condition if it thinks it appropriate in the circumstances. Sub-section (3) provides that the rule in s 33 extends to registration effected apart from the MRA, where restrictions imposed by the mutual recognition principle do not apply. And sub-s (4) provides that s 33 "has effect despite any other provisions of [Pt 3]".

170 Sub-sections (2), (3), and (4) of s 33 thus make manifest the intention that the mutual recognition principle does not support an interpretation of s 20 that would proscribe consideration, in disciplinary proceedings, of any requirements relating to character or fitness or propriety to carry on the occupation. However, while disciplinary action is not generally within the scope of the mutual recognition principle, and although s 33 has effect despite any other provisions of Pt 3, s 33 cannot undermine the entirety of the mutual recognition principle. A constraint imposed on the ability of the local authority of the second State to take disciplinary action is therefore that such action can only be taken in respect of "actual service delivery"[142]. The laws of the second State could not empower the second State's local authority to take disciplinary action for the

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142 Special Premiers' Conference, *The Mutual Recognition of Standards and Regulations in Australia: A Discussion Paper* (1991), Technical Attachment at 12 [3.2.10].

failure of the person to obtain a right to practise by separate registration in the second State[143].

(3) The extraordinary consequences of the second interpretation

171 An obvious consequence of the second interpretation is that it has the potential substantially to undermine many State provisions concerning disciplinary action across numerous occupations existing both at the time of enactment of the MRA and subsequently. This consequence is so stark that it casts significant doubt upon whether the second interpretation could have been intended by the Commonwealth Parliament. The context of that intention is that the MRA was enacted pursuant to a referral of power to the Commonwealth Parliament from the States under s 51(xxxvii) of the *Constitution*, and requests from the Australian Capital Territory and the Northern Territory, following an inter-governmental agreement between the Commonwealth, the States, the Australian Capital Territory, and the Northern Territory[144]. It would be surprising if the States intended to refer power, and the Commonwealth intended to legislate on that referral, in a manner that would undermine numerous existing and likely future State disciplinary provisions.

172 The consequence of the second interpretation is that it would have rendered, and would continue to render, inoperative all those State provisions permitting the local authority of the second State to suspend or cancel a registration, after disciplinary inquiries or hearings, on the basis of character or fitness to practise. At the date of enactment of the MRA there were many State provisions that enabled local authorities to take disciplinary action against registered members of occupations or licence holders on the basis of character or fitness to practise. Some of the many examples of these provisions in 1992 were fishers, health professionals, lawyers, pest controllers, real estate agents, teachers, builders, plumbers and drainers, and electrical contractors[145]. It would

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143 Special Premiers' Conference, *The Mutual Recognition of Standards and Regulations in Australia: A Discussion Paper* (1991), Technical Attachment at 11-12 [3.2.9]-[3.2.10].

144 Agreement Relating to Mutual Recognition Between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia, 11 May 1992.

145 *Fisheries Act 1976* (Qld), s 80(1)(f); *Chiropractors and Osteopaths Act 1991* (NSW), ss 28(1)(e), 49(1)(g); *Dentists Act 1989* (NSW), ss 31(1)(g), 47(1)(b); *Dental Act 1939* (WA), ss 30(1)(e), 30(3)(e); *Nurses Act 1991* (NSW), ss 44(1)(f), 64(1)(g); *Podiatrists Act 1989* (NSW), ss 14(1)(e), 16(1)(h)-(i); *Podiatrists*

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also reasonably have been expected in 1992 that many more State provisions would continue to enable local authorities to take such action. And these now include such disciplinary inquiries into fitness to practise in occupations requiring registration such as childcare service providers[146], fishers[147], health professionals[148], labour hire service providers[149], lawyers[150], motor vehicle

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Registration Act 1984 (WA), ss 28(1)(e), 28(2)(a); *Psychologists Act 1989* (NSW), ss 14(1)(e), 16(1)(g)-(h); *Psychologists Registration Act 1976* (WA), ss 39(1)(e), 39(2)(a); *Legal Profession Act 1987* (NSW), ss 123 (para (b) of the definition of "professional misconduct"), 163(1); *Legal Profession Practice Act 1958* (Vic), ss 2A (para (j) of the definition of "misconduct"), 38ZB(1)(c), 84(1)(i); *Health Act 1937* (Qld), s 131R(1)(d); *Auctioneers and Agents Act 1941* (NSW), ss 29(1)(b)-(c), 29(3); *Estate Agents Act 1980* (Vic), ss 25(2)(a)(ii), 28(1)(b), 28(2); *Land Agents, Brokers and Valuers Act 1973* (SA), ss 85(1)(c), 85a(1)(c)(ii), 85a(2)(c)(ii), 85a(3)(c), 85a(4)(c)(ii), 85a(5)(c); *Auctioneers and Agents Act 1971* (Qld), ss 23(4), 81B(d), 81C(d), 81G(c)-(d); *Real Estate and Business Agents Act 1978* (WA), ss 103(1)(c), 103(2)(d), 103(3)(c), 103(4)(d); *Education Act 1972* (SA), s 65(2)(b); *Education (Teacher Registration) Act 1988* (Qld), ss 4 (para (b) of the definition of "misconduct"), 39(2)(b); *Building Services Corporation Act 1989* (NSW), ss 55(1)(b), 55(2)(d), 74(e)-(f); *Building Control Act 1981* (Vic), ss 101(7)(e), 103(1)(c), 103(3)(c); *Electricity (Licensing) Regulations 1991* (WA), regs 17(1), 30(1)(a), 46(1)(a).

146 *Children (Education and Care Services) National Law* (NSW), ss 21(1), 25(a), 31(a); *Education and Care Services National Law* (Vic), ss 21(1), 25(a), 31(a); *Education and Care Services National Law* (SA), ss 21(1), 25(a), 31(a); *Education and Care Services National Law* (Qld), ss 21(1), 25(a), 31(a); *Education and Care Services National Law* (WA), ss 21(1), 25(1)(a), 31(a); *Education and Care Services National Law* (Tas), ss 21(1), 25(a), 31(a).

147 *Fisheries Act 1995* (Vic), ss 58(1)(a)(i), 58(5); *Fish Resources Management Act 1994* (WA), s 143(1)(cc).

148 *Health Practitioner Regulation National Law* (NSW), ss 55(1)(h)(i), 60(1), 149C(1)(d); *Health Practitioner Regulation National Law* (Vic), ss 5 (para (c) of the definition of "professional misconduct"), 196(1)(b)(iii), 196(2)(d)-(e); *Health Practitioner Regulation National Law* (SA), ss 5 (para (c) of the definition of "professional misconduct"), 196(1)(b)(iii), 196(2)(d)-(e); *Health Practitioner Regulation National Law* (Qld), ss 5 (para (c) of the definition of "professional misconduct"), 196(1)(b)(iii), 196(2)(d)-(e); *Health Practitioner Regulation National Law* (WA), ss 5 (para (c) of the definition of "professional misconduct"), 196(1)(b)(iii), 196(2)(d)-(e); *Health Practitioner Regulation National Law* (Tas), ss 5 (para (c) of the definition of "professional misconduct"), 196(1)(b)(iii), 196(2)(d)-(e).

inspectors and repairers[151], passenger transport service providers[152], pest controllers[153], pyrotechnicians[154], real estate agents[155], tattooists[156], teachers[157], and various tradespersons[158].

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149 *Labour Hire Licensing Act 2018* (Vic), ss 22, 39(1)(a)(ii), 40(1)(b); *Labour Hire Licensing Act 2017* (SA), ss 10, 23(1)(f); *Labour Hire Licensing Act 2017* (Qld), ss 22(1)(b)(v), 24(1)(c), 27.

150 *Legal Profession Uniform Law* (NSW), ss 297(1)(b), 302(1)(h); *Legal Profession Uniform Law* (Vic), ss 297(1)(b), 302(1)(h); *Legal Practitioners Act 1981* (SA), ss 20AC(a), 20AD(1), 69(b), 82(6)(a)(iv), 89(2)(c); *Legal Profession Act 2007* (Qld), ss 60(a), 61(2)(b)-(c), 419(1)(b), 456(2)(b); *Legal Profession Act 2008* (WA), ss 55(a), 56(3)(b)-(c), 403(1)(b), 439(a); *Legal Profession Act 2007* (Tas), ss 64(a), 65(2)(b)-(c), 421(1)(b), 471(b).

151 *Motor Dealers and Repairers Act 2013* (NSW), ss 38(1)(c), 45(1)(c), 45(1)(g); *Road Transport (Vehicle Registration) Regulation 2017* (NSW), cll 72(1)(b), 90(3)(c); *Road Safety Act 1986* (Vic), s 15A(1)(a).

152 *Passenger Transport Act 2014* (NSW), s 33(1)-(2); *Passenger Transport Act 1994* (SA), ss 36(2)(e)(ii), 36(3)(c)(iii)-(iv), 50(1)(c); *Passenger Transport Regulations 2009* (SA), reg 31(a)(ii); *Transport (Road Passenger Services) Act 2018* (WA), ss 42(1)(d), 79(1)(e); *Passenger Transport Services Act 2011* (Tas), s 31(1)(b)(i).

153 *Pesticides Act 1999* (NSW), ss 5B(1), 52(2)(f); *Controlled Substances (Pesticides) Regulations 2017* (SA), reg 14(c)(i)(C); *Health (Pesticides) Regulations 2011* (WA), regs 38(2)(d), 39(2)(e), 50(d), 51(1)(b)-(c).

154 *Explosives Act 2003* (NSW), s 21(b); *Explosives (Fireworks) Regulations 2016* (SA), reg 32(c); *Explosives Act 1999* (Qld), ss 23(d), 24(3); *Explosives Regulations 2012* (Tas), reg 53(2)(e).

155 *Property, Stock and Business Agents Act 2002* (NSW), ss 191(e), 192(1)(f)-(g); *Estate Agents Act 1980* (Vic), ss 25(1)(b), 28A(1)(d)-(e); *Property Occupations Act 2014* (Qld), ss 36(1)(a), 172(1)(g)(i), 172(1)(g)(vii), 186(2)(a)-(b); *Real Estate and Business Agents Act 1978* (WA), ss 103(1)(c), 103(2)(d), 103(3)(c), 103(4)(d); *Property Agents and Land Transactions Act 2016* (Tas), ss 83(1) (para (b) of the definition of "professional misconduct"), 110(1)(a)-(b).

156 *Tattoo Parlours Act 2012* (NSW), ss 3(1) (para (b)(i) of the definition of "adverse security determination"), 25(1), 26(1)(b); *Tattoo Industry Act 2013* (Qld), ss 33(1), 34(1)(a)(i).

157 *Education and Training Reform Act 2006* (Vic), ss 2.6.46(1)(c), 2.6.46(2)(i)-(j); *Teachers Registration and Standards Act 2004* (SA), ss 33(1)(c), 35(2)(c)(ii)-(iii);

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173 The consequence of the second interpretation is that the local authority of the second State, in which the person now practises, would be powerless in disciplinary proceedings under these provisions to deregister the person or to suspend or cancel her or his licence to practise, even in the most serious cases of unfitness to practise. If the second interpretation were correct then although a person might reside and practise exclusively in the second State, deregistration could only occur if action were taken by the first State, which has no present connection with the person. In other words, the State with a direct interest in discipline could not take action and action could only be taken by the State with no interest in taking disciplinary action.

Conclusion

174 The third interpretation, as submitted by Mr Andriotis, should be accepted. Neither the text nor the context of the MRA, particularly s 20, supports the first interpretation. And, for the three reasons that I have explained above, the third interpretation should be preferred to the second. It may be that some or all of the three reasons for preferring the third interpretation to the second interpretation led the Office of Regulation Review to say without qualification, in a paper discussing the impact of mutual recognition, that "once registered, practitioners are subject to the disciplinary powers of the local registering authority"[159]. Similarly, in an early review of the mutual recognition scheme, it was said without qualification that a basic principle of the scheme was that[160]:

> "the newly registered practitioners are subject to the local laws or regulations covering how the services in question are to be provided or

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Education (Queensland College of Teachers) Act 2005 (Qld), ss 92(1)(h), 160(2)(d)-(e); *Teacher Registration Act 2012* (WA), ss 24(d)(ii), 47(f)(ii), 70(1)(d), 84(1)(b)(i)-(ii); *Teachers Registration Act 2000* (Tas), ss 17J, 20(3)(e), 24(b)-(d).

158 *Home Building Act 1989* (NSW), ss 56(b), 57(b), 62(e)-(f); *Building Act 1993* (Vic), ss 178(f)-(g), 179(1)(g), 179B(1); *Plumbers Licensing and Plumbing Standards Regulations 2000* (WA), regs 27(b), 34(1)(f)-(g); *Electricity (Licensing) Regulations 1991* (WA), regs 30(1)(a), 31(2)(a)-(c), 46(1)(a), 47(2)(a)-(b); *Occupational Licensing Act 2005* (Tas), ss 90(1)(c), 90(2)(c), 90(2)(d)(ii), 93(1)(d)-(e).

159 Office of Regulation Review, *Impact of Mutual Recognition on Regulations in Australia: A Preliminary Assessment*, Information Paper (1997) at 2.

160 Head, "The Scheme Affecting Occupations", in Thomas and Saunders (eds), *The Australian Mutual Recognition Scheme: A New Approach to an Old Problem* (1995) 28 at 29.

how the business is to be conducted. Therefore, they are also subject to the local codes of conduct and local disciplinary powers."

175 The appeal should be dismissed with costs.